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GREAT OCTOBER REVOLUTION: MYTH OR REALITY?

Sayings like "time heals many wounds", "time makes one forget many things" and "time tests people a lot," seem to apply to the Great October Socialist Revolution 1917 of Russia also. It is true that the 1789 French Revolution, the earlier American Revolution (War of Independence 1774) and the so-called revolutions in Britain and continental Europe radically changed the picture of Europe and the West, leading to the establishment and flourishing of what is called or derided as 'bourgeois democracy'. But those moments are not taken with so much zeal and nostalgia as the Russian Revolutions of 1917 are considered; particularly the October Revolution is considered as the shining beacon paving way for the rise and success of national liberation movements in colonies and semi-colonies the world over, standing up to the aggressions and invasions of the American imperialists and their allies. The serious study of some eminent scholars reviewing these revolutions after 100 years, which report is published in this issue, contains a cool, non-adulatory analysis and depiction of the world-shaking Russian revolutions of 1917. This, even after an estimated 30-40 million people (mainly Russians) in the Soviet Union perished in the Great Patriotic War of 1941-45, and their huge sacrifices become the crucial factor for the defeat of fascism and victory of democracies in the World War II. Now the ongoing war in Ukraine has again raised many disturbing questions as the Russians seem to have developed a sort of feverish, aggressive nationalism in opposition and response to the unjustified expansion of NATO and the horrible invasions and genocidal wars of the American imperialists and the EU countries in the Middle East and Afghanistan and the unending expansion of NATO. The crucial question is what is the *raison d'être* for NATO itself once the Warsaw Pact was abolished, the Soviet Union no more there and Russia is no longer a 'socialist' country? NATO should also have been abolished soon after the abolition of the Warsaw Pact and collapse of the Soviet Union, especially after the solemn promises by the Americans during the crucial US-Soviet peace talks of the late 1980s and early 1990s not to move it an inch farther toward the East. But the enlargement of NATO and the bloody invasions and wars in the Middle East and Afghanistan demonstrate the horrible and cruel nature of the American imperialists and their allies and have led to the Ukrainian impasse now. In this context, the reality and impact of the Russian Revolutions of 1917 still haunt the world people very much, even after the exposure of several myths around the same. ♣♣♣

ACADEMIC FREEDOM IS DEAD: SAYS ANTI-LOCKDOWN PROFESSOR

- Dr. Paul Craig Roberts ♣

Anti-Lockdown Stanford Professor: "Academic Freedom Is Dead"

BY TYLER DURDEN, Saturday, Nov 26, 2022- 12:45 AM

[*Authored by Steve Watson via Summit News*]

Dr. Paul Craig Roberts introduces this article with the comment: "An immigrant-invader protects American principles from White Liberals and the corrupt American Establishment. Be thankful for **Dr. Jay Bhattacharya**."

> **A Stanford Professor who challenged the orthodoxy of lockdowns has warned that "academic freedom is dead," and that all those who have stood up to the regime narrative now face "a deeply hostile work environment."**

Dr. Jay Bhattacharya, an author of the ***Great Barrington Declaration*** in which **thousands of scientists called for a policy of herd immunity over lockdowns**, warned that "When you take a position that is at odds with the scientific clerisy, your life becomes a living hell." // Speaking at the Academic Freedom Conference at Stanford's Graduate School of Business recently, Bhattacharya, who previously described lockdowns as the *most catastrophically harmful policy in "all of history*," and "*the single worst public health mistake in the last 100 years*," noted "we have a high clerisy that declares from on high what is true and what is not true."

In a further interview with Fox News, Bhattacharya noted "The basic premise is that if you don't have protection and academic freedom in the hard cases, when a faculty member has an idea that's unpopular among some of the other faculty – powerful faculty, or even the administration … If they don't protect it in that case, then you don't have academic freedom at all."

Bhattacharya and thousands of other academics and scientists were initially vilified for damning lockdowns, but have since been vindicated as the *societal* and *medical* toll of the shutdowns has been revealed. Bhattacharya said of the declaration, ***"The purpose of the one-page document was aimed at telling the public that there was not a scientific consensus in favor of lockdown, that in fact many epidemiologists, many doctors, many other people – prominent people – disagreed with the consensus."***

The professor then described how proponents of the declaration were systematically frozen out of discussions and debates.

"If Stanford really truly were committed to academic freedom, they would have… worked to make sure that there were debates and discussions, seminars, where these ideas were discussed among faculty," he urged, adding that ***"power replaced the idea of truth as the guiding light."***

"So you have somebody like **Tony Fauci** who **says unironically**, that if you question me, **you're not simply questioning a man, *you're questioning science itself*.**" Bhattacharya further noted, adding "That is an exercise of raw power, where he places himself effectively as the pope of science rather than a genuine desire to learn the truth."

"They systematically tried to make it seem like everyone agreed with their ideas about COVID policy, when in fact there was deep disagreement among scientists and epidemiologists about the right strategy," the professor asserted. Bhattacharya has also called on new Twitter owner Elon Musk to "expose the government censorship regime,": Bhattacharya's comments come as a new analysis of federal and state data revealed that for the first time a majority of Americans dying from COVID were at least partially vaccinated.

"**Fifty-eight percent of coronavirus deaths** in August were *people who were vaccinated or boosted*," the *Washington Post* reports in a piece headlined '**Covid is no longer mainly a pandemic of the unvaccinated**'. (Zero Hedge)

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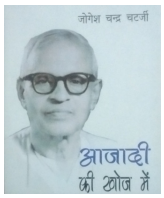
♣ Courtesy: via **Paul Craig Roberts** at www.paulcraigroberts.org; dt. 29-11-2022; edited; emphases in bold ours - IMS.



IN SEARCH OF FREEDOM

- **Jogesh Chandra Chatterji**♣

CHAPTER XIV

THE JUDGMENT AND AFTER

THE DAY OF JUDGMENT (Contd...)

FATEHGARH CENTRAL JAIL: ONE YEAR

Although it was known that this source was under strong suspicion, yet Mr. Sheo Varma took the risk and went to the jail gate to try to establish a new connection with me. No sooner he reached there he realised that he was being followed by the C.I.D. men. He took the train for Khudlapur and before the train arrived at the station he jumped down from the running train and took shelter with Mr. Gaya Prasad, who was practicing there. The C.I.D. man who followed him in the train from Fatehgarh also jumped down and saw Sheo Varma entering the house of Dr. Gaya Prasad at village Jalalabad, just near the station.

In the early morning hours the house was surrounded by the police, but before the search started both Sheo Varma and Gaya Prasad managed to escape. Later they were both prosecuted in the famous Lahore Conspiracy Case with Sardar Bhagat Singh and others and were given life sentence. My name also appeared prominently in that case for their attempt to take me out from Fatehgarh and Agra Jails.

After my transfer to Agra Jail, Pande hired a house at Agra and carried on communications with me. Gradually the Party headquarters was also shifted to Agra and a bomb factory was started there in a separate house where martyr Jatin Das (died in Lahore Jail by hunger strike) gave them training in the art of bomb-making.

My transfer was ordered and the police dug up the jail ground at many places in search of the pistol but did not find it. It was **just a false accusation and no pistol was brought in by anybody.** Ganda Singh wanted to have his own way. After some time when I was in the Agra Jail, I was told by the Head Jailor, C.W. Laig, that Ganda Singh had successfully cashed on that fake against me as it was due to that he was awarded the title of Sardar Bahadur.

For the head-warder he created an awkward situation by implicating him in a political matter. He got frightened and left the job without any protest and the poor fellow died in Bombay. Only to attract attention of higher authorities he made a mountain out of a mole hill. In fact the I.G. of Prisons was in his hands and the Superintendent of Jail was a new and inexperienced man. He himself fabricated the accusation against me and then without giving me any chance for any clarification before the Superintendent, he got signed from the Superintendent what he wanted and then he called me and transferred me with the highest possible punishment in those circumstances.

According to the Jail Manual the prisoner accused of any Jail offence would be put up before the Superintendent on Peshi. The latter would ask for the explanation. Then if the Superintendent was convinced about the offence, he would write it on his History Ticket. I was not put up before the Superintendent, nor was I told by the Jailor anything of the kind.

And then at the time of my transfer to Agra Jail Ganda Singh warned the policemen who had to escort me. I was handcuffed, roped, cross bar fettered and then transferred from Fatehgarh Jail under a heavy escort of police. I was moving slowly due to cross bar fetters. I was physically put in an Ekka to reach the railway station. At the station every one who saw me was surprised that so many armed men were employed to escort a lean and thin man in chains. We got down at Shikohabad as we had to board another train for Agra. But one overbridge had to be crossed which was not possible for me as I was under cross bar fetters. The police men led me to

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♣ Continued from *Law Animated World*, 15 November 2022 issue; emphases in bold ours - IMS.

another platform by crossing the rails. On that platform when we were waiting for the train for Agra, one law student who was going to Agra to appear in final examination got attracted towards me after seeing such heavy armed escorts with me. He asked me whether I was a South Indian. I told him that I was a Bengali but now he should take me to be of U.P. I was domiciled in U.P. He asked about my case. I told him "Kakori Case". As soon as he heard me, he was astonished to see the behaviour of the police. He told the Havildar in charge that he was giving him money and that he should buy sweetmeats and other eatables of my choice and give them to me. The policeman refused. He said that he could not accept money for this purpose. He came to me and told me that though he was given only four annas for my meals, I should not mind and eath whatever wanted. He said that he would pay for that. I refused this offer with thanks. We reached the Agra Jail in the night and for the whole night I was kept under bell chain. Early in the morning when the Head Jailor, Mr. Laing, came and asked whether I could speak English. My answer was 'yes'. He wanted to know the case in which I was convicted. I told him that it was Kakori Case. In the morning that Havildar who escorted me tendered his apology to me. He told me that he was warned by Ganda Singh that I was a very dangerous man and that some persons would try to make me free on the way; but he said that he found me a perfect gentleman.

In the train I saw green papers along with my other papers with the Havildar. I took it from the Havildar when the train was in motion and was surprised to read in it that the Superintendent had awarded the highest punishment, namely (1) cellular confinement for three months, (2) bar fetters for an indefinite period and (3) exemption from the remission system, for attempt at escape from the jail with the help of firearms and instruments for cutting iron gratings. All this despite the fact that nothing ws found even after a thorough search! All was in the imagination of Ganda Singh for his personal promotion at any cost. This is, however, what I thought at that time. But later I learnt that my friends outside had a plan to take me out of the jail.

AGRA CENTRAL JAIL: ONE YEAR

After spending the night under fetters and bell chain when next morning I was **put up before the Superintendent, Major Sheikh, at the jail gate I complained to him about the illegal way of punishing me without even telling me what were the charges**. He heard me patiently and said **that he was not concerned with what the authorities of other jails did but he gave the assurance that no such such thing would be done in his jail**. He **was quite true to his words** and in fact **I have never seen such an honest and upright Superintendent in my life**. I had full confidence in him and he also had confided in me.

Col. Clements was a petty man. He was cowardly and as a weak man he was prone to put us in trouble. It would not be quite out of place to mention here that in 1921 when Pandit Motilal Nehru was in the Lucknow Jail, Clements was the Superintendent. Petty man as he was, he wanted to show that as the Superintendent he was somebody in the jail. Panditji was a giant before this pigmy. So only to humour him Panditji used to put one smuggled letter before him every morning as a proof that the Superintendent had no control over his jail.

I was kept under lock and key day and night in a cell in the cellular barrack. Suresh Chandra Bhattacharya and Ram Krishna Khatri were sent to this jail immediately after they were sentenced. They were on good terms with the jail authorities as the authorities had come to know that they were not troublesome in any way. From my cell I established contact with them. Suresh Babu was at times smuggling newspapers and he used to send these to me in the midday when the officials used to be absent.

I received a copy of the *Leader* of Allahabad in my cell in which appeared an editorial note evidently from the pen of the editor, late C.Y. Chinatamani extolling and welcoming the ceremonial establishment of the Republic of China. Such a strong editorial from a moderate paper was unthinkable. I read it again and again

and then returned the paper. It was **an open support for armed revolution and implied the condemnation of the non-violent movement of India**. So also did Pandit Madan Mohan Malaviya. Though moderate in politics, he preferred a revolution. He was in England as a delegate to the Round Table Conference. At that time Sir John Anderson's name was announced as the Governor designate of Bengal. Sir John earned much notoriety as the war time Governor of Ireland in suppressing the liberation movement of the Irish people by ruthless means. So Malaviyaji directly challenged the then Secretary of State for India questioning if that was the motive behind his appointment in the presence of many Members of Parliament. There were even hot exchange of worlds.

I remember even today the article written by late C.Y. Chintamani. Who knew then that after getting China free, the revolution would be betrayed? Who could know then that the communists under Mao after ousting Chiang would become so much expansionist that they would lead a large-scale invasion on India after so much talks of friendship? Yes, this **the eternal rule of politics: *Might is Right***. Mao's China has created a big might and they must assert their right over their weak neighbours!

To be lodged in a U.P. Jail as a C Class habitual prisoner was a strain on the health of a Bengalee. My weight was reduced to about 100 lbs. This was because I could not take Chapaties and so I took rice and the rice that was served was not at all eatable. I gave up my food and declared a hunger strike. For three days nobody took any notice of me, though my Kakori associates became very much perturbed.

On the 4th morning I was put up by the Head Jailor Mr. Laing before the Superintendent for the Peshi. When the Superintendent asked me why I was not taking food I told him that it was not possible for me to take such repulsive food. I was a man from East Bengal. I was not used to eating the sort of rice served to me. So was the case with Dal and these two were my day-to-day diet. I was on fetters and it was difficult to pass my janghia through the fetters when I want to answer nature's call.

The reasonable Superintendent understood my genuine grievances and he knew that withou any ailment my weight had been reduced to 100 lbs. from 146 lbs. That was a proof before a doctor. He asked me what minimum things I required. I stated that a changed dal and separately cooked rice can give me relief. For changing clothes I might be allowed a lungi on special grounds. It may be mentioned that this was given to the Muslims and Sikhs. In this the jailor supported me.

The Superintendent gave written orders that my rice and changed dal be cooked separately in the hospital and he gave me a lungi as a special case and wrote the order on my History Ticket. I gave up hunger strike and thanked the Superintendent and the Jailor. From that day we three were getting rice and dal separately cooked for us and it was really a bit tasty. We were getting a little vegetable also from the hospital. Our friends were relieved now.

I had heard that Dublishji had been sent to the Andamans. I wanted to go there. I wrote a letter to Dublishji and received an encouraging reply from him. At this time a demand also came from the Andamans for convict clerks. I gave my name and a casual convict, a Jat, who read up to Class VIII also gave his name.

At this time I received a letter from Bijoy Kumar Sinha through Suresh Babu's source. It was very heartening. Then followed a continuous series of correspondence. I **informed my friends outside that I had given my name for my transfer to the Andamans. But Bijoy pressed me that I must not go. I agreed and asked for a fever-producing drug named Raskapur**. I received this and it was decided that in case I received the transfer order, just before my departure I would take the drug, should get high temperature and thwart all attempts to transfer me. This drug was used by Mr. Shatrughna Kumar of the Bareilly shooting case and he ran high temperature and was successful in getting his transfer as a suspected T.B. patient

to Sultanpur Special T.B. Jail. But **I did not require to use the drug, because the Andaman authorities rejected my application** and accepted that of the Jat.

Though a habitual, I was kept in the Casual Circle as we three were kept in three different places. Suresh Babu was sent to the Habitual Circle and Khatri was kept under the Head Jailor. One black-striped man amongst all red-striped men was a striking thing to all. Even the dangerous habituals were on the best of terms with me when I was in the cells. One educated Pathan zamindar of a good family who was a lifer for dacoity told me one Sunday that he would invite more trouble on him. He did not listen to my advice, attacked the Superintendent, received a good thrashing and came back to the cell bleeding profusely and after a week received more than 30 stripes. Another healthy Hindu youth of fine appearance told me a day prior to the annual visit of the I.G. of Prisons that he would assault the Head Jailor during the I.G.'s visit. I entreated him not to do so. But he actually did so and received beatings, stripes and cell life. These showed how much confidence these prisoners had in me.

I was all along having correspondence with my party men through Bijoy. He would write some day that Azad sends his 'namaskar' or on something about Balwant Singh, because that was the name I gave to Bhagat Singh when he came to Kanpur. Suresh Babu told me one day he had seen some C.I.D. people in the Agra Jail with a photo of Bhagat Singh.

Bijoy wanted to know so many things from me about so many persons but never a word was mentioned about Virbhadra Tewari and Tewari was in their full confidence, nay, he was in-charge of the U.P. organisation. But we could not rely on him as he was let off by the lower court although there was ample evidence to entangle him in the Kakori Case.

International situation on the North Eastern frontiers was taking a very favourable turn. Amir Amanullah, the king of Afghanistan, became pro-Russian under the influence of the Indian revolutionaries, Raja Mahendra Pratap and others. China had already become a single Republic under Chiang. So I was very hopeful about our future.

I advised my friends to establish a line of communication for our secret organization throughout northern India. At least there must be units established in big railway junctions. The other point I stressed was to try to have communications with Afghanistan and Burma. Later the statement of Kailashpati in the Delhi Conspiracy Case, proved that they did this, as he stated that Badshahgul was given Rs. 2,000/- out of Rs. 16,000/- looted in the Garodia Bank Dacoity.

I gave them to understand **that a political murder was very effective if it served a big public purpose**. As examples I mentioned the cases of Khudiram Bose at Muzaffarpur, Kanailal in the Calcutta Jail and the Delhi Bomb outrage on Lord Hardinge. I stated that secret organizations had come into prominence and captured the imagination of the general public by such actions. **Saunders murder** took place not long after this and **my suggestions might have given my friends the idea of retaliation of the murder of Lalaji by the British police officers.**

That year (1928) Amir Amanullah became a world figure by his open pro-Russian and anti-British demonstrations. The Amir went on European tour, his main objective was to visit Russia. Britain disliked it and despite the King of England's personal request he went to Moscow and placed a wreath on Lenin's Mausoleum.

I saw that **these developments were golden opportunities for the Indian revolutionaries** and **I urged upon my friends to get themselves prepared for the utilisation of the situation**. They were making every possible efforts. They even **changed the name of the party from 'Hindustan Republican Association' to 'Hindustan Socialist Republican Association' or Army** in a Delhi meeting.They **recruited Badshahgul to the party at this stage**. (He is the **son of Haji of Turangjai** in the no-man's land beyond the North West Frontier Province).

(to be continued)

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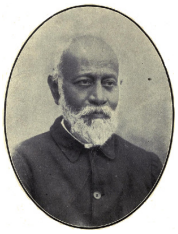

RISE OF THE CHRISTIAN POWER IN INDIA

- Major B.D. Basu, I.M.S.♣

CHAPTER IV

RESTORATION OF MIR JAFAR

Mir Jafar formulated his complaints against the Company of Christian merchants under the above thirteen heads. His grievances were not sentimental but real and substantial. But, as usual, the Company and their representatives in Bengal took no notice of them and so no redress was granted to him. He gained but little by his abject submissiveness, except the transmission of the title to his family.

THE COURT OF DIRECTORS ON THE INLAND TRADE

The Court of Directors had no interest in the Inland Trade and, therefore, they were able to pronounce their disinterested judgment on it. They of course condemned the action of the Board. It seems that the Court came to know of the Inland Trade from some private information. The following extracts from their letters to Bengal sufficiently disclose their views on the subject:

THE NAWAB TO BE INFORMED ACCORDINGLY

"Unwilling as we always are to place too much confidence in private informations, yet these are too important to pass unnoticed. If what is all stated is a fact, it is natural to think that the Nawab, tired out and disgusted with the ill-usage he has received, has taken this extraordinary measure, finding that his authority and government are set at nought and trampled upon by the unprecedented behaviour of our servants and the agents employed by them in the several parts of the Nawab's dominions. If we are right in our conjecture, we positively direct, as you value our service, that you do immediately acquaint the Nawab, in the Company's name, that we disapprove of every measure that has been taken in real prejudice to his authority and government, particularly with respect to the wronging him in his revenues by the shameful abuse of Dustucks, and you are further to inform him that we look upon his and the Company's interest to be so connected that we wish for nothing more than to have everything put on such a footing that the utmost harmony may be promoted and kept up between us.

COLONEL CAILLAUD HONOURABLY ACQUITTED

"Having considered with the greatest attention every circumstance of your providings with respect to the allegation against Colonel Caillaud for consenting to a proposal of the late Nawab Jaffiar Ali Khan to cause the Shahzada to be seized or cut off, we are unanimously of opinion that he stands honourably acquitted of any design or intention upon or against the life of that Prince.

DISAPPROVAL OF EVERY MEASURE TAKEN AGAINST THE NAWAB

Although we have not received any letter from you since that which bore the date the 14th February 1763, which gave us some general account of very disagreeable altercations with the Nawab, yet private advices have been received which take notice that the Nawab having made repeated complaints of the notorious abuse of Dustucks by which he lost great part of his customs, and having obtained no redress, he at once overset the Company's servants by declaring all goods custom free, so that their Dustucks are of no use.

ALL THE NAWAB'S GRIEVANCES TO BE REDRESSED

"In order to promote this harmony, you are most heartily and seriously to undertake under your consideration every real grievance the Nawab lays under, to redress them to the utmost of your power and prevent such abuses in future. And, with respect to the article of Dustucks in particular, you are hereby positively directed to

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♣ Continued from *Law Animated World*, 15 November 2022 issue; emphases in bold ours - IMS.

confine this privilege as nearly as possible to the terms granted in the Firmans, and you are to give the Nawab all the assistance you can to reinstate him in the full power of collecting and receiving his revenues, which as Subah he is justly entitled to.

IMPATIENT FOR FURTHER INTELLIGENCE

"We are impatient for your next advice, that we may be informed of your proceedings with respect to this important affair, and that we may give you our sentiments thereupon in a more full and explicit manner, which we hope will be before the dispatch of our last letters this season.

PRIVATE TRADE THE CHIEF CAUSE OF ALL THE MISUNDERSTANDING WITH THE NAWAB

"One great source of the disputes, misunderstandings and difficulties which have occurred with the country Government, appears evidently to have taken its rise from the unwarrantable and licentious manner of carrying on the private trade by the Company's servants, their Gomastas, Agents, and others to the prejudice of the Subah, both with respect to his authority and the revenues justly due to him, the diverting and taking from his natural subjects the trade in the inland parts of the country, to which neither we nor any persons whatever dependent upon us, or under our protection, have any manner of right, and consequently endangering the Company's very valuable privileges. In order, therefore, to remedy all these disorders, we do hereby positively order and direct –

ALL INLAND TRADE TO BE ABOLISHED

"That from the receipt of this letter, a final and effectual end be forthwith put to the inland trade in salt, betel nut, tobaccos, and in all other articles whatsoever produced and consumed in the country, and that all Europeans and other agents or Gomastas who have been concerned in such trade be immediately ordered down to Calcutta, and not suffered to return or be replaced as such by any other persons.

EXPORT AND IMPORT TRADE ALONE TO BE DUTY FREE

"That as our Firman privileges of being duty-free are certainly confined to the Company's export and import trade only, you are to have recourse to, and keep within, the liberty therein stipulated and given as nearly as can possibly be done. But, as by the connivance of the Bengal Government and constant usage, the Company's covenant servants have had the same benefit as the Company with respect to their export and import trade, we are willing they should enjoy the same, and that Dustucks be granted accordingly. But herein the most effectual care is to be taken that no excesses or abuses are suffered upon any account whatsoever, nor Dustucks granted to any others than our covenant servants as aforesaid. However, notwithstanding any of our former orders, no writer is to have the benefit of the Dustuck until he has served out his full term of five years in that station. Free merchants and others are not entitled to or to have the benefit of the Company's Dustucks, but are to pay the usual duties.

ALL AGENTS TO BE ABOLISHED. ALL TRADE TO BE CARRIED ON THROUGH THE COMPANY'S FACTORIES

"As no Agents or Gomastas are to reside on account of private trade at any of the inland parts of the country, all business on account of licensed private trade is to be carried on by and through the means of the Company's covenanted servants resident at the several subordinate Factories, as has been usual.

ALL PERSONS ACTING CONTRARY TO ORDERS TO BE DISMISSED THE SERVICE

"We are under the necessity of giving the before-going orders in order to preserve the tranquility of the country and harmony with the Nawab. They are rather outlines than complete directions, which you are to add to, and improve upon, agreeably to the spirit of, and our meaning in them, as far as may be necessary to answer the desired purpose. And if any person or persons are guilty of a contravention of them, be they

whomsoever they may, if our own servants they are to be dismissed the service, if of others, the Company's protection is to be withdrawn, and you have the option of sending them forthwith to England if you judge the nature of the offence requires it."

But when the directors were ordering their servants to make amends to the injured Nawab, Mir Kasim was a fugitive from his country. He had fled to the dominions of the ruler of Oudh, whom he was instigating to invade Bengal and drive out the English from that part of India.

SHAH SHUJA'S WAR WITH THE ENGLISH

Mir Kasim, as said before, entered the territory of the ruler of Oudh on the 4th December 1763. Shah Shuja was the Nawab Vazir of the Mughal Empire. The Emperor Shah Alam had not yet gone to Delhi but was staying at Allahabad and so Shah Shujah was in possession of his person. Under the circumstances, the ruler of Oudh was the virtual Emperor of Hindustan. It was, therefore, that Mir Kasim negotiated with him, and entered his territory after making him take a solemn oath on the Koran that he would espouse his cause and help him to regain the *masnad* of Bengal, Behar and Orissa.

Large were the presents which Mir Kasim made to Shah Shuja and his female relatives.[*] He addressed Shah Shuja's mother as his mother and so considered the ruler of Oudh as his brother. The raja of Bundelkhand was giving trouble to the sovereign of Hindustan by not paying the tribute. The Mughal Empire was *in extremis*, and so the Bundelkhand chief saw his opportunity to assert his independence. The Nawab had come to Allahabad in order to send an expedition against that chief. There was some delay in the despatch of the expedition. Perhaps the timid Vazir was not sure about its success and so he was procrastinating in its dispatch. But Mir Kasim considered the delay as fatal to his cause. Writes the author of the *Seir*:

> "As he feared nothing so much as a delay, the consequences of which might afford the English time enough to fix themselves firmly in their new conquests, he sent a pressing message to the Vizier on that subject. He was answered, that such an expedition could not be commenced, before the countries about Ilah-abad were brought into order. Mir Kasim replied, that if this was all that detained the Vizier, it was needless that he (Mir Kasim) should remain with so much artillery, and so many good troops uselessly encamped. Please, said he, to refer that small affair to me, your friend, and I will undertake in a little time to bring it to a conclusion with a deal of ease."[Ψ]

The proposal being accepted, Mir Kasim with his trained troops, did not find any difficulty in defeating the Bundelkhand chief, who submitted to pay the arrears of his tribute. After his successful campaign he returned to Allahabad and the Emperor and the Vizier were so pleased with the manner in which he had conducted the expedition and brought it to a successful issue, that they acceded to his request and made every necessary preparation to march eastwards to fight the English.

Fortunately for Mir Kasim, dissensions had taken place in the camp of the English. Many European officers and soldiers as well as Indian Sepoys were deserting the Company's flag and were going over to the camp of the Vazir of the Emperor.[♠] But, unfortunately, there was no statesman on the Moslem side to take advantage of these dissensions and thus weaken the Christians. The troops of the Moslem rulers were also unruly and ungovernable. Writes the author of the *Seir*:[♦]

> "But there was so little order and discipline amongst these troops, and so little were the men accustomed to command, that in the very middle of the camp they fought against each other, killed and murdered each other, plundered each other,

[*] *Seir-ul-Mutakfierin*, iv, 521 *et seq.* (Calcutta reprint)

[Ψ] *Ibid.*, II, 523.

[♠] *Ibid.*, II, 524 (Calcutta Reprint).

[♦] *Ibid.*, p. 526.

> and went out a-plundering and a-marauding without the least scruple or the least control. No one would inquire into those matters, ... They behaved exactly like a troop of highwaymen. It was not an army, but a whole city in motion, ..."

Another blunder of the troops of the Moslem rulers consisted in heavy baggages which they carried with them. An Indian army to make itself comfortable always carries not only articles of necessity but also those of luxury with its camp. And this has been the cause of the disasters which have befallen many an army fighting in or out of India.

The war was undertaken with the express object of replacing Mir Kasim on the *masnad* of Bengal. Shuja-ud-daula wrote the following letter to the Governor and Council:

> "Former Kings of *Indostan*, by exempting the *English* Company from duties, granting them different settlements and factories, and associating them in all their affairs, bestowed greater kindness and honour upon them, than either upon the country merchants, or any other Europeans. Moreover, of late, his Majesty has graciously conferred on you higher titles and dignities than was proper, and jagheers and other favors since, notwithstanding these various favors which have shown you have interfered in the King's country, possessed yourselves of districts belonging to the Government, such as Burdwan and Chittagong, etc., and turned out and established Nabobs at pleasure, without the consent of the Imperial Court. Since you have imprisoned dependants upon the Court, and exposed the government of the King of Kings to contempt and dishonour, since you have ruined the trade of the merchants of the country, granted protection to the King's servants, injured the revenues of the Imperial Court, and crushed the inhabitants by your acts of violence, and since you are continually sending fresh people from Calcutta, and invading different parts of the royal dominions, and have even plundered several villages and *pergunnah*s belonging to the province of *Ilahabad*, to what can all these wrong proceedings be attributed, but to an absolute disregard for the Court, and a wicked design of seizing the country for yourselves? If you have behaved in this manner in consequence of your king's commands, or the Company's directions, be pleased to acquaint me of the particulars thereof that I may show a suitable resentment, but if these disturbances have arisen from your own improper desires, desist from such behaviour in future; **interfere not in the affairs of the government**, withdraw your people from every part, and send them to your own country, **carry on the Company's trade as formerly**, and **confine yourselves to commercial affairs**. **In this case** the **Imperial Court will more than every assist you** in your business, and **confer its favours upon you**. Send hither some person of distinction as your Vakeel, to inform me properly of all circumstances, that I may act accordingly. **If** (which God forbid) **you are haughty and disobedient, the heads of the disturbers shall be devoured by the sword of justice, and you will feel the weight of his Majesty's displeasure, which is the type of the wrath of God**; nor will any submissions or acknowledgments of your neglect hereafter avail you, as your Company have of old been supported by the royal favours. I have therefore wrote to you, you will act as you may think advisable, speedily send me your answer."

It behoved Shuja as Vazir of the Mughal Empire to write to the English merchants in the tone which he adopted in the above letter. **No one can deny that right as well as law on the side of the Emperor. The English were trying to usurp his authority and power**, and so it **was necessary to tell them in the plainest language that they should desist from the path they were pursuing.**

The **English were frightened out of their wits** when the Emperor and the Vazir with Mir Kasim invaded Behar. And they **had very good reasons for being so.** According to the *Seir*:

> "The **English**, meanwhile, **being much diminished in number**, and **much fatigued by so severe a campaign** in the **very height of the rainy season**, had commenced flagging. **Intimidated by Shuja-ud-dowla's character for prowess**, and **impressed with an opinion of bravery** and number of his troops, **they did not think themselves a match for them in the field**. With this notion they repassed the Sohon, and **resolved to retire within the walls of Azim-abad.** The **camp at Buxar was therefore raised**, and they retreated with precipitation."

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(to be continued)

RUSSIAN REVOLUTION 1917 : REVIEW AFTER 100 YEARS

- Vasily Zharkov, et al.♣

The 1917 Russian Revolution for our country and the world: 100 Years' Retrospect

By Vasily Zharkov, Andrey Zakharov, Andrey Ryabov, Mark Simon; Edited by Andrey Zakharov, Olga Zdravomyslova, Andrey Ryabov

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INTRODUCTION

In world history, the Russian Revolution is among those few events the role and impact of which not only get conflicting and often diametrically opposing assessments but are also still relevant to struggle between different various political forces and ideologies. And there are good reasons for that. The **1917 Revolution proclaimed the liberation of people from the oppression of autocratic government and inequality as its goal; however, it resulted in the creation of the Soviet totalitarian state which suppressed individual expression and rights** and **was hostile to the very idea of freedom**. Soviet people en masse were granted access to education, modern knowledge, etc., but at the same time **any civic initiative was prohibited unless sanctioned from the top, and dissent was severely punished.**

The impact of the Revolution and the Soviet Project on the world was equally mixed. Once faced with this challenge, the capitalist world started to change – it had to take greater account of the needs and demands of large segments of the population. The example and support of the Soviet Union were a powerful driver for peoples of colonies and semicolonies in their struggle for national and social liberation. However, the Soviet social and economic system ultimately proved uncompetitive – it failed to support a steady social or technological progress and lost a historical competition to global capitalism.

Although statement of these clear internal conflicts makes many question the view of the 1917 Russian Revolution as a holistic phenomenon in human history, the goal of comprehending the meaning, consequences, and lessons of this revolution is still very important and relevant.

So what was it – a failed, doomed attempt to improve human society or a forward-looking Project which goals and approaches were not fully clear even to its own initiators and leaders? Which historical results and implications of the Russian Revolution still have an impact on today's Russia and the world, and what was relegated to the past, forever remaining just a legacy of the 20th century?

The complexity of these issues for our contemporaries is due not least to the fact that perceptions of the 1917 Russian Revolution both among politicians and the public in general are still strongly influenced by the views that were dominant during the Soviet era. According to these views, the Revolution opened up for Russia unlimited opportunities for development, and a prospect of evolving into a leading global power, radically changing the foundations of human civilization and the course of its further evolution.

Ambiguous results and internal contradictions of the 1917 revolution

Russia entered the capitalist era at about the same time as other European states. However, its relative geographical remoteness from the core of

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♣ Courtesy: **Vasily Zakharov, et al**; at Gorbachev Foundation; dated 27-10-2017; edited; emphases in bold ours - IMS.

the development of capitalism and the presence of significant internal resources for a long time made it possible to maintain the existing military-feudal structure, which held back the capitalist transformation of the economy and the modernization of the state. This predetermined a simple - "protective" - response to external challenges. The **Russian monarchy responded to the European revolutions by "tightening the screws" within the country**. Periodically **by the authorities "reforms from above" were initiated, but** just as periodically, **as soon as it became clear that reforming was impossible without changing the existing internal political, legal and social order, another "freezing" of the existing system took place.** Thus, **for more than a century before the revolution, the Russian protectors always prevailed over the systemic liberal reformers** and **actually blocked the evolutionary path of the country's development** in the direction of socio-economic and political modernization.

Meanwhile, in the depths of the Empire and at the level of society, at least **starting with Alexander Herzen, another answer was brewing, combining the idea of a "special path" and the idea of socialism**. It was embodied in the ideology and practice of the revolutionary movement, in the formation and development of which the Russian intelligentsia played an important role. In the conditions of tough opposition of the Russian absolutist state to any attempts of systemic socio-political changes, it was the revolutionary movement that began to claim the role of the main subject of the urgent changes. This, to a large extent, brought the prospect of revolution closer.

By **1917, primarily because of the First World War, tsarist Russia was placed in a difficult, in fact, impasse**. The continuation of hostilities threatened with an internal catastrophe, and the withdrawal from the war meant the loss of the status of a participant in the "concert of great powers." Unable to cope with the burden of military defeats and unable to withstand the growing pressure from opposition liberal circles and the strike movement of workers, the Romanov monarchy collapsed in February 1917.

But the Russian Revolution took place in a country with a weak economy and underdeveloped civil institutions, with almost no experience. Democracy and class cooperation, in a society with a strong social and cultural stratification, where even among the intelligentsia, as the authors of the Milestones collection wrote, the ideas of the Enlightenment were assimilated superficially and incompletely. Warmly accepting the enlightenment ideas of progressivism and universalism, the Russian intelligentsia was carried away mainly by the Voltaireian line in this powerful ideological and philosophical current, which assigned the first place in improving the social order - the formation of the New Man. At the same time, another tradition of the Enlightenment, which emphasized the development of institutions and the concept of natural human rights, was not given due attention.

If **European societies followed the path of gradual improvement of the competitive systems of capitalism** in their countries, then in **predominantly agrarian and military-feudal Russia**, representatives of the Europeanized strata **nurtured ideas of destruction "to the ground" with the subsequent implementation of abstract plans for building a just society, different from both tsarism and and Western liberal democracies**. This largely predetermined the combination of utopianism and radicalism characteristic of Russian political culture, which determined the spirit of the Russian Revolution of 1917.

Although there is a **widespread point of view in post-Soviet Russia**, according to which, after the overthrow of the tsarist monarchy, many alternatives opened up for the country, and the **victory of the Bolsheviks was the result of an almost accidental coincidence of many factors, in reality, the corridor of opportunity on the way from February to October 1917 was not wide**. For the implementation of the liberal-democratic and even more so the social-democratic agenda in the country, there were neither institutional conditions, nor cultural foundations, nor formed political forces.

Representatives of the ruling class of the Russian Empire, neither in the period from

February to October 1917, nor later, during the years of the civil war, could not develop an adequate response to the problems that caused the revolution. They were closely connected with the state machine of the Romanov Empire and had no experience of independent government. Having lost reliance on the monarchy with its huge bureaucratic apparatus, they were unable to develop new political ideas that were attractive to the majority of society and did not have the ability to make social compromises.

By the **beginning of the revolution, there was not a single social group or class in the country, including the industrial proletariat, that would be interested in establishing a political order based on leveling, administrative coercion and state ownership**. Among the **mass strata of Russian society, the demand for deep social reforms dominated**, primarily in the sphere of agrarian and labor relations, including, for example, the allocation of land to peasants and the introduction of an eight-hour working day for workers. For the **educated segments of the population**, the **transition to a parliamentary system and separation of powers was of priority**. Thus, there was a **demand for democratic, socially oriented capitalism**. In this sense, **Russia was no different from other European countries, where revolutionary events also broke out** – such as Germany, Finland, Hungary, Slovakia. But the revolution in Russia proved susceptible to Bolshevism. This became possible due to a complex of reasons, analyzed in detail in historiography.

The **February Revolution of 1917 destroyed the former state apparatus** and within a few months **led to the paralysis of the country's administration**. Russia, in essence, had **no experience of democratic development, as a result of which the masses began to perceive the emerging freedom as permissiveness**. And, finally, a **huge role in the social and political life of the country**, incomparable with other warring states, **began to be played by the lumpenized sections of the population**, knocked out of their usual social niches and relations. **It was they who formed the mass basis for the implementation of the Bolshevik Project**, which seemed to many a gamble. It was **thanks to these circumstances** that the **Bolshevik Party came to power**. The **capture and retention of power in such a situation** was already a **matter of political technique and technology**. The **successful solution of these tasks by the Bolsheviks was primarily due to the fact that their leaders possessed the art of political tactics to perfection**, significantly surpassing their competitors in organization, the **ability to speak with the masses and manipulate them**.

The Bolsheviks were **able to skillfully use the political slogans that gained immense popularity - the demand for peace and the speedy implementation of land reform**, which would give land to tens of millions of peasants. In the short distance from February to October, the question of an **immediate peace "without annexations and indemnities"** not only entered the Russian political agenda, but became almost the main demand of the masses. As for the **question of land**, it was **a key problem in the country's internal political development**, starting with the peasant reform of 1861. The **Bolshevik monopolization of popular slogans deprived the Provisional Government of mass support** and **made it easier for the Bolsheviks to seize power in October.**

The powerful social dynamics that the Revolution brought about **brought to the fore the illiterate mass of the agrarian population**. Its transformation into a real political and social actor significantly reduced the modernization potential of changes, caused by the revolution.

The **most important goal that the Bolsheviks proclaimed** when they came to power was **to build a society of freedom and social equality**. However, **as the mobilization model of administrative-distributive socialism** took shape, **these ideals were replaced by guidelines for the complete subordination of the country's citizens to the will of the ruling party and the totalitarian state**. In part, this **predetermined the failure in the implementation of the Bolshevik strategy aimed at the formation of the New Man, the builder of a communist society**. Although it must be admitted that this goal, by definition, was unrealizable. **Within the framework of the established social model, instead of the former class inequality, a new type of social inequality arose** - between the **ruling minority and the controlled majority**.

Another goal of the Bolshevik Project was **to achieve universal literacy** and **create** in Russia, later in the Soviet Union, **an urban industrial society**.

In the **course of building socialism "in a hostile environment," another goal was added** to this: the **transformation of the USSR into a militarily powerful power with an advanced defense industry. *Both of these goals were largely achieved***. By the mid-1950s, the Soviet Union had indeed succeeded in building an urban industrial society. Thanks to the **great attention** that was **given to the increment of natural science knowledge and mass education, a significant human capital was accumulated in the USSR.**

Thus, **for fundamental reasons, the transformative possibilities of the Russian Revolution of 1917 were limited**. The limitation was due to the peripheral nature of the Russian Empire, the lack of resources available to it for modernization. This predetermined both the inconsistency of the further political development of Soviet Russia and the consequences of the Russian Revolution for the world as a whole.

As the birth of a new political and social Project Inheriting the revolutions of modern times, the **Russian revolution carried the pathos of a radical break with the past, combined with the idea of public freedom**. "Freedom" in this case means not just liberation from certain forms of oppression, but, mainly, the **establishment of a fundamentally new form of government - the establishment of a public sphere**. This is what made "revolutionary" the projects of various political forces that took part in both the February and October events. The history of the Russian Revolution, whatever the chronological framework given to this phenomenon, is largely a rivalry of such projects, each of which outlined its own horizon of social utopia. However, the Bolshevik project was not initially homogeneous: discussions about ways to reorganize certain spheres of society did not stop until the early 1930s, when they were forcibly stopped by Stalin.

Awareness of the possibility of breaking with an outdated tradition and gaining a sense of genuine novelty is an important feature of modern revolutions. With this in mind, the notion of revolution as a historical deterministic "transition" from "archaic" to "modern" is an obvious simplification. Therefore, it is advisable to consider the course of the Russian Revolution as a combination of discrete rather than continuous processes, events and discourses, without denying their interconnectedness, and also bearing in mind the structural political and economic factors that contributed to the strengthening of some tendencies and the suppression of others.

Politically, **by the beginning of 1917, there was no single revolutionary project in Russia**. Various political forces had different visions of the path that the impending revolution was to open. From the point of view of the liberals, its task was to establish a parliamentary system with a responsible government and establish the equality of citizens before the law, regardless of their origin, social status and property status. All this was supposed to facilitate integration into the community of advanced Western states with which Russia was in the same military coalition during the First World War. The socialist parties – Mensheviks and Socialist-Revolutionaries – considered the impending revolution as a starting point for profound social and democratic reforms, the implementation of which, as they saw it, would lay the groundwork for the country's movement in the direction of socialism. The extreme left - maximalists and anarchists - saw in the revolution an opportunity to realize the utopias of a "working republic", or the Russian embodiment of the idea of self-governing socialism and a federation of anarchist communes.

The **Bolshevik (Leninist) project of a new society,** as it took shape by 1917, **looked very eclectic**. Nevertheless, the **Bolsheviks were the only party among the European Social Democrats that set as the most important practical task creation of the state of the dictatorship of the proletariat**. Among the European socialists, such demands existed in the party programs, but nowhere were they considered as the immediate goals of practical politics. From the Narodniks, the Bolsheviks borrowed the idea

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SUPREME COURT OF INDIA AT NEW DELHI

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL No. 7095 OF 2022

[arising out of SLP (Civil) No. 5236/2022]

Date of Judgment: Thursday, 13 October 2022

AISHAT SHIFA … APPELLANT(S)

Versus

The State of Karnataka and others. … RESPONDENTS

CORAM:

HEMANT GUPTA, J.

SUDHANSHU DHULIA, J.

with WRIT PETITION (CIVIL) NO. 120 OF 2022 and CIVIL APPEALS NO. 7075 OF 2022; 6957 OF 2022; 7078-7083 OF 2022, 7077 OF 2022, 7074 OF 2022, 7076 OF 2022, 7072 OF 2022, 6934 OF 2022, 7084 OF 2022, 7085 OF 2022, 7092 OF 2022, 7088 OF 2022, and WRIT PETITION (Civil) NO. 95 OF 2022 with Civil Appeals Nos. 7087 OF 2022, 7090 OF 2022, 7096 OF 2022, 7091 OF 2022, 7089 OF 2022, 7086 OF 2022, 7069 OF 2022, 7098 OF 2022, 7093 OF 2022, 7099 OF 2022 & 7070 OF 2022

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J U D G M E N T

SUDHANSHU DHULIA, J

1. In the long hearing of this case, which went on for several days, I had the privilege of listening to the erudite submissions of learned counsels from both sides. On behalf of the Petitioners we have heard, Mr. Kapil Sibal, Mr. Rajeev Dhawan, Mr. Dushyant Dave, Mr. Salman Khurshid, Mr. Colin Gonsalves, Mr. Yusuf Hatim Muchhala, Mr. Huzefa Ahmadi, Ms. Meenakshi Arora, Mr. Aditya Sondhi, Mr. Sanjay R. Hegde, Mr. Devadatt Kamat, Ms. Jayna Kothari, Mr. A.M. Dar learned Senior Advocates and Mr. Prashant Bhushan, Mr. Shoeb Alam, Mr. Nizam Pasha, Ms. Kirti Singh and Mr. Thulasi K. Raj learned Advocates. The arguments on behalf of the State were made by Mr. Tushar Mehta, Solicitor General of India, Mr. K.M. Nataraj, Additional Solicitor General of India and Mr. Prabhuling Navadgi, Advocate General for Karnataka learned Senior Advocates. Mr. R. Venkatramani, Ms. V. Mohana and Mr. Dama Seshadri Naidu, learned Senior Advocates have appeared on behalf of the teachers.

2. I had the advantage of going through the Judgement of Justice Hemant Gupta. Justice Gupta has recorded each argument which was raised at the Bar before us in the long hearing of the case and he has given his findings on each of the issues. It is a very well composed Judgement. I am, however, **unable to agree with the decision of Justice Gupta. I am therefore giving a separate opinion, on this important matter**.

3. While I do so, I am conscious that as far as possible, a Constitutional Court must speak in one voice. Split verdicts and discordant notes do not resolve a dispute. Finality is not reached. But then to borrow the words of Lord Atkin (which he said though in an entirely different context), "…**finality is a good thing, but Justice is better.**"[1]

4. The Judgement impugned before this Court was pronounced by the Karnataka High Court on March 15, 2022. This was challenged before this Court in several SLP's. Apart from the SLP we also had before us two Writ Petitions filed under Article 32 of the Constitution of India. The Karnataka High Court was dealing with 7 Petitions where the lead matter was W.P. (C) No. 2347 of 2022. All the same while we deal with the facts of the present case, we would be referring to Aishat Shifa who was there in Special Leave Petition (Civil) 5236 of 2022, and was one of the two Petitioners before the Karnataka High Court, in Writ Petition (Civil) No. 2880 of 2022. We have heard this as the lead matter. On 22.09.2022 leave was granted by this Court, and Judgement was reserved.

5. In the district of Udupi in Karnataka there is a small town called Kundapura. Aishat Shifa and

[1] ***Ras Behari Lal and Others vs. The King-Emperor*** in AIR 1933 PC 208

Tehrina Begum were the two second year students of Government Pre-University College in Kundapura. They both follow Islam religion and wear hijab. According to them they have been wearing hijab, inside their classrooms, ever since they joined the college, more than a year back. They say that in the past they had never faced any objection from anyone, including the college administration and their wearing of hijab inside their classroom was never an issue.

6. On February 3, 2022, these two girl students were stopped at the gate of their college. They were told that they will have to take off their hijab before entering the college. **Since they refused to take off their hijab, they were denied entry in the college, by the college administration.**

7. The next day, that is February 4, 2022, both made a representation before the Deputy Commissioner Udupi, praying that direction be given to the college authorities to let them enter their college and complete their studies. No effective orders were passed by the Deputy Commissioner, but instead the Government came up with an Order on February 5, 2022. This G.O has a Preamble, which refers to the Karnataka Education Act, 1983 and the Rules framed therein, from where it draws its powers and then cites three Judgments of different High Courts to conclude that prohibiting hijab does not amount to a violation of Article 25 of the Constitution. It then mandates that the Government schools must have a school uniform and the colleges which come under the jurisdiction of the Pre-University Education Department the uniform which is prescribed by the College Development Committees (in Government colleges), and Board of Management (in private schools), should be worn. There was, however, **a caveat**, which said **that in the event the Board of Management did not mandate any uniform then students should wear clothes that are "in the interest of unity, equality and public order."**

8. Since the entire G.O. has been reproduced by Justice Hemant Gupta in his Judgement I need not reproduce the entire G.O., but the relevant portion of the G.O are as under:

> "In the backdrop of the issues highlighted in the proposal, using the powers granted by the Karnataka Education Act Section 133 (2), all the government schools in the state are mandated to abide by the official uniform. Private schools should mandate a uniform decided upon by their board of management. In colleges that come under the preuniversity education department's jurisdiction the uniforms mandated by the College Development Committee, or the board of management, should be worn. In the event that the management does [sic does not] mandate a uniform, students should wear clothes that are in the interests of unity, equality and public order. **By the Orders of the Governor of Karnataka**"

9. Since hijab was not made a part of the 'uniform,' and wearing it was not 'in the interest of unity, equality and public order,' as the G.O. mandated, the Petitioners were denied entry in their school. This Court has been informed at the Bar, that similar restriction was imposed on other school going girls in different parts in Karnataka.

10. The two girls, who were the students were then constrained to file Writ Petitions before the Karnataka High Court. Initially the case went before a learned Single Judge of the High Court, who in turn, considering the importance of the matter, referred it to the Chief Justice for constituting a larger bench. A three-judge bench was constituted by the Chief justice, which has heard the matter at length and then passed its orders on March 15, 2022, dismissing the Writ Petitions, an order which is presently impugned before this Court.

11. Before the Karnataka High Court as well as before this Court the main argument of the Petitioners was that the G.O. dated February 5, 2022, and the restrictions imposed by the school authorities in not permitting the Petitioners to wear hijab inside their classrooms amounts to a violation of their Fundamental Rights given to them under Article 19(1)(a) and Article 25(1) of the Constitution of India as well as under Articles 14 and 21of the Constitution. Some of the Petitioners also raised a claim that wearing of hijab is a part of their Essential Religious Practice. The

argument of the State on the other hand would be **that the G.O only directs the school authorities of respective schools to prescribe a school uniform**. It is an **innocuous order**, which is **religion neutral**. As to the argument on Fundamental Rights, the reply was that Fundamental Rights are not absolute and they are always subject to reasonable restrictions. **Prohibiting hijab inside a classroom is a reasonable restriction. Wearing of hijab was also said to be not an Essential Religious Practice.**

12. The **Karnataka High Court had formulated four questions** for its consideration. These questions are as follows:

a) Whether wearing hijab/headscarf is a part of Essential Religious practice in Islamic Faith protected under Article 25 of the Constitution.

b) Whether prescription of school uniform is not legally permissible, as being violative of petitioners' Fundamental Rights inter-alia guaranteed under Article 19(1)(a), (i.e., freedom of expression) and 21 (i.e., privacy) of the Constitution.

c) Whether the Government Order dated 05.02.2022 apart from being incompetent is issued without application of mind and further is manifestly arbitrary and therefore violates Article 14 and 15 of the Constitution?

d) Whether any case is made out in Writ Petition Number 2146 of 2022 for issuance of a direction for initiating disciplinary enquiry against Respondent No. 6 to 14 and for issuance of a Writ of Quo Warranto against Respondent No. 15 and 16?

13. As far as the first question is concerned the High Court has given a finding that wearing of hijab by Muslim women does not form a part of Essential Religious Practice in Islamic faith. On the second question it was held that prescription of school uniform places only a reasonable restriction which is Constitutionally permissible and cannot be objected by the students. As regards the third, i.e., the G.O of 5 February 2022 it was again held that the Government has powers to issue such an order and no case is made out for its invalidation. The fourth point was also given in the negative.

14. One of the grounds raised by the Petitioners in their challenge to the validity of the G.O. dated February 5, 2022 is that it is merely an Executive Order. But it has far reaching consequences as far as curtailment of Fundamental Rights of the Petitioner are concerned given to her under Article 19(1)(a) and 25(1) of the Constitution. It was submitted that the settled position of law is that restrictions on Fundamental Rights can only be imposed by a statutory law and not by executive order. The decision of this Court in ***Kharak Singh v. State of Uttar Pradesh***[2] was relied upon. This submission, however, is not correct and therefore declined. The reasons being, that under Section 133[3] of the Karnataka Education Act, 1983 the Government has powers to give directions. Section 145 of the 1983 Act gives the State Government powers to make Rules, which have been made and are called the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula Etc.,)

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[2] (1964) 1 SCR 332

[3] *'**133. Powers of Government to give directions –** (1) The State Government may, subject to the other provisions of this Act, by order, direct the Commissioner of Public Instruction or the Director or any other officer not below the rank of the District Educational Officer to make an enquiry or to take appropriate proceedings under this Act in respect of any matter specified in the said order and the Director or the other officer, as the case may be, shall report to the State Government in due course the result of the enquiry made or the proceedings taken by him.*

(2) The State Government may give such directions to any educational institution or tutorial institution as in its opinion are necessary or expedient for carrying out the purposes of this Act or to give effect to any of the provisions contained therein or of any rules or orders made thereunder and the Governing Council or the owner, as the case may be, of such institution shall comply with every such direction.

(3) The State Government may also give such directions to the officers or authorities under its control as in its opinion are necessary or expedient for carrying out the purposes of this Act, and it shall be the duty of such officer or authority to comply with such direction"

Rules, 1995. Rule 11(1),[4] of the above Rules' states that the recognized educational institutions can prescribe uniform. Therefore, the State Government in any case has powers to prescribe a uniform/dress code. Therefore, the submissions that the G.O is not a valid law is not correct. The G.O draws its source from the statue and the statutory rules. Therefore, it has the force of law. Nevertheless, the fact remains that it still has to pass muster the provisions of Articles 19 and 25 of the Constitution.

15. Out of the four questions formulated by the Karnataka High Court the first question is in fact the crucial one. Everything depended on the determination on this question. But then the Court had set a very tall order for the Petitioners to prove their case. The **Petitioners had to prove that wearing of hijab forms a core belief in the religion of Islam**. ERP also meant that such a practice should be fundamental to follow as a religious belief or practice as ERP was held to be the foundation, on which the superstructure of the religion was erected. **Essential Religious Practice would mean a practice without which religion would not remain the same religion**. Also, the Petitioners had to prove that the practice of wearing hijab is a practice which is being followed since the very beginning of their religion. This was the task set up for the Petitioners to prove their case. But this was not enough, this was only the threshold requirement. The Petitioners also had to prove that the ERP does not militate against any of the Constitutional values. This perhaps was right, because an ERP which is an invasion on the Fundamental Rights of others will not be given the protection. The Court held as follows[5]:

> "…There is absolutely no material placed on record to prima facie show that wearing of hijab is a part of an essential religious practice in Islam and that the Petitioners have been wearing hijab from the beginning. This apart, it can hardly be argued that hijab being a matter of attire, can be justifiably treated as fundamental to Islamic faith. It is not that if the alleged practice of wearing hijab is not adhered to, those not wearing hijab become the sinners, Islam loses its glory and it ceases to be a religion. Petitioners have miserably failed to meet the threshold requirement of pleadings and proof as to wearing hijab is an inviolable religious practice in Islam and much less a part of 'essential religious practice'…"

As the Petitioners did not meet the threshold requirement, the High Court did not feel it necessary to touch on the aspect of Constitutional Values. Therefore, they stated that :-

> "It hardly needs to be stated that if Essential Religious Practice as a threshold requirement is not satisfied then the case would by extension not travel to the merits surrounding the domain of those Constitutional Values."

16. The Judgement then upholds the validity of the G.O dated February 5, 2022 and holds that the authorities have power to prescribe uniform in schools.

17. In my opinion, the question of Essential Religious Practices, which we have also referred in this judgement as ERP, was not at all relevant in the determination of the dispute before the Court. I say this because when protection is sought under Article 25(1) of the Constitution of India, as is being done in the present case, it is not required for an individual to establish that what he or she asserts is an ERP. It may simply be any religious practice, a matter of faith or conscience! Yes, what is asserted as a Right should not go against "public order, morality and health," and of course, it is subject to other provisions of Part III of the Constitution.

18. Partly, the Petitioners had to be blamed for the course taken by the Court as it was indeed the Petitioners or some of the Petitioners who had claimed that wearing of hijab is an essential practice in Islam. Before us, however, when arguments were raised at the Bar, some of the Counsels did admit that ERP was not the core

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[4] '***11. Provision of Uniform, Clothing, Text Books etc. –***
(1) Every recognised education institution may specify its own set of Uniform. Such uniform once specified shall not be changed within the period of next five years.

[5] Para XII at Page 87 of the Judgement

issue in the matter, but the Petitioners before the Karnataka High Court had no choice as they were, inter alia, attacking the Government Order dated 5 February 2022, which clearly stated that prohibiting hijab in schools will not be violative of Article 25 of the Constitution of India. Be that as it may, the fact remains that the point was raised. It was made the core issue by the Court, and it went against the Petitioners.

19. The **approach of the High Court could have been different**. Instead of straightaway taking the ERP route, as a threshold requirement, **the Court could have first examined whether the restriction imposed by the school or the G.O on wearing a hijab, were valid restrictions?** Or **whether these restrictions are hit by the Doctrine of Proportionality**. In ***Bijoe Emmanuel and Ors. vs State of Kerala and Ors*[6]**.** this is what the Court had to say:

> "…Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practice and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorized by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare and reform. It is the duty and function of the court so to do."

20. Be that as it may, let us examine as to **how and what the entire concept of Essential Religious Practice has been defined by this Court.**

21. The **test of ERP has been laid down** by this Court in the past **to resolve disputes of a particular nature**, which we shall discuss in a while. By and large these were the cases where a challenge was made to State interference on what was claimed to be an "essential religious practice." What was raised was the protection of Article 25 as well as Article 26 of the Constitution of India. In other words, these were the cases where both Article 25 (1) and (2) and Article 26 were in play. Essentially, these were the cases where the rituals and practices of a denomination or a sect of a particular religion sought protection against State intervention. Even when Rights of an individual were raised, as we may say in the case of ***Shayara Bano v. Union of India and Ors.*[7]** which is the Triple Talaq case or the case of ***Indian Young Lawyers Association and Ors. (Sabarimala Temple, In Re.) v. State of Kerala and Ors.*[8]** which is commonly known as the *Sabarimala* case, these were **cases where an individual right was asserted against a religious practice or where there was an assertion, primarily on a religious identity**. In the **case at hand**, the **question is not merely of religious practice or identity but also of 'freedom of expression,'** given to a citizen **under Article 19(1)(a) of the Constitution** of India, and this makes this case different.

22. The expression 'essential religious practices' it seems was taken from the Constituent Assembly Debates. In response to a query, Dr. Ambedkar categorically said that what is protected under Article 25 of the Constitution is not every religious practice but only such practices which are essentially religious. The relevant passage of the Constituent Assembly Debates VII: 781 is reproduced hereunder:

> "…there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious…"

23. The first case, all the same, in this regard which came up for consideration before the Supreme Court was ***Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[9]** which is famously known as the *Shirur Mutt* case. The facts of this case were that the Mathadhipati of Shirur Math at Udupi had preferred a challenge to

[6] 1986 3 SCC 615; Para 19

[7] (2017) 9 SCC 1

[8] (2019) 11 SCC 1

[9] (2019) 11 SCC 1

the powers of the Commissioner under the Madras Hindu Religious Endowments Act (Act 2 of 1927) who was exercising control over the affairs of Shirur Math. The Writ Petition was allowed by the Madras High Court and a Writ of Prohibition was granted in favour of the Mathadhipati. This order was challenged before the Supreme Court by the Commissioner, Hindu Religious Endowments, Madras. Inter-alia, therefore before the Supreme Court was the question of whether the provisions of the Act were an invasion on the exercise of Fundamental Rights of the Mathadhipati and the Management of the Temple, given to them under Article 25 and 26 of the Constitution. This Court then proceeded to elaborate on the meaning of religion and how it has to be understood in the context of the Constitution. While delivering the concurring opinion on behalf of the Seven Judge Constitutional Bench, Justice B.K. Mukherjea held as follows:

> "…**Religion is certainly a matter of faith with individuals or communities** and it is **not necessarily theistic**. There are **well known religions in India** like **Buddhism and Jainism** which **do not believe in God or in any Intelligent First Cause**. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual wellbeing, but it would **not be correct to say that religion is nothing else but a doctrine of belief**. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and models of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.[10]"

24. The Court **held that the guarantee under** [the] **Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion** and this is **made clear using the expression 'practice of religion,' in Article 25**. This **Court rejected** the submissions of the Ld. Attorney General of India, as he then was, **that the State must be allowed to regulate the secular activities which are associated with a religion which do not constitute the essential part of it**. The observations falling from the court in the ***Shirur Mutt Case*** (supra), in this regard were as follows:

> "19. …The learned Attorney-General lays stress upon clause 2(a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.
>
> 20. … The contention formulated in such broad terms cannot, we think, be supported. **In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself**. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)[11].'
>
> **(emphasis supplied)**

Thereafter though the concept like ERP had come, but **what constitutes Essential Religious Practices was left to the doctrine of that religion itself**.

25. The next case which came up for consideration of this Court was in ***Ratilal Panachand Gandhi v. State of Bombay and Ors.***[12] wherein the Petitioners had challenged the Constitutional validity of the Act known as the Bombay Public Trusts Act, 1950 inter-alia, on grounds that the provisions in the Act were an invasion of their Fundamental Rights, given to them under Article 25 as well as Article 26 of the Constitution. Basically, it

[10] Para 17 of *Shirur Mutt* Case *(supra)*

[11] Paras 19 & 20

[12] 1954 SCR 1055; Para 23

followed the same line of thought as laid down in the *Shirur Mutt* (supra) case. The observations of the court are:

> "10. …The **free exercise of religion** by which is **meant the performance of outward acts in pursuance of religious belief**, is, as stated above, **subject to State regulation imposed to secure order, public health and morals of the people**. What **sub-clause (a) of clause 2 of Article 25 contemplates** is **not State regulation of the religious practices as such** which are protected unless they run counter to public health or morality **but of activities which are really of an economic, commercial or political character** though they are associated with religious practices."

26. We now come to the decision of the Supreme Court in ***Durgah Committee, Ajmer, and Anr. v. Syed Hussain Ali and Ors.***[13] In this case the 'khadims' of the Hazrat Haji Moinuddin Chishti had challenged the Constitutional Validity of the Dargah Hazrat Khwaja Saheb Act, 1955 before the Rajasthan High Court. The 'khadims' of the Durgah of Khwaja Moin-ud-din Chishti (also known as the Durgah Khwaja Saheb, Ajmer), claimed to be the followers of a Sufi sect or Silsila called Chishti and they claimed they were doing service in the Dargah of Sufi Saint Hazrat Haji Moinuddin Chishti . Their case was that the interference of the Dargah Committee amounts to an invasion of the Fundamental Rights, inter alia, guaranteed to them under Article 25(1) of the Constitution of India. The Rajasthan High Court had substantially allowed their claim and against the said order the Dargah Committee was before the Supreme Court. The questions which fell for consideration before this Court was whether any person as a Sunni Muslim could manage the affairs of the Durgah or whether this could only be done by the followers of Chishti Silsila. There were some other questions as well, which would not be relevant for discussion in the context of this decision. The Supreme Court had allowed the appeal of the Durgah Committee by setting aside the order of the Rajasthan High Court, holding, inter alia that khadims could not claim the right under Article 25(1) of the Constitution of India. The **Supreme Court in this case, went on to determine as to what would be an ERP and how the Court would determine the same**. All the same this was done again as there was an interplay of Article 25 and Article 26 of the Constitution, and what was being asserted were the Rights of a Sect or a denomination against State intervention.

27. The Judgements of this Court in ***Acharya J. Avadhuta & Ors. v. Commissioner of Police, Calcutta & Anr.***[14] and ***Commissioner of Police & Ors. v. Acharya J. Avadduta***[15] both relate to the performance of *tandav* dance in a public place by the followers of the faith of 'Anand Margis.' The Kolkata Police had banned such performance of *tandav* dance in public places under Section 144 of the Code of Criminal Procedure, 1973. The matter ultimately came up before this Court in 1983 and it was **held that performing *tandav* dance in public places is not an essential part of the 'Anand Margi' faith**. The matter again reached before this Court in 2004 and a 3-Judge bench of this Court reached the same conclusion by relying upon the earlier Judgement of 1983.

28. Therefore, what can be clearly distinguished here is that while dealing with the concept of Essential Religious Practices or whether a particular practice can be termed as an ERP, this Court was dealing with questions related to both Article 25 as well as Article 26 of the Constitution. These were the cases which were either concerned with the management of an activity related to a religious shrine or Institution or where the State had met some kind of resistance or challenge by the citizens, who claimed rights both under Article 25 and 26 of the Constitution of India. These were also the cases

[13] (1962) 1 SCR 383. Traditional accounts castigate this Khwaja Saheb with sordid deeds of fanaticism, rape etc. and of collusion in the capture and killing of Prithviraj Chauhan and the rape and death of Rani Samjukta, in service of Mohammed Ghori. We think it is the duty of conscientious intellectuals to do thorough research to ascertain the veracity of such allegations too - Ed.

[14] (1983) 4 SCC 522

[15] (2004) 12 SCC 770

where a community, sect or a religious denomination of a religion was against the State action. This, however, is not presently the case before this Court. We have **before us a case of assertion of individual Right as different from what would be a community Right**. We are concerned only with Article 25(1) and not with Article 25(2) or Article 26 of the Constitution of India. **Whereas Clause 1 of Article 25 deals with individual rights, Article 25(2) and Article 26 of the Constitution of India, deal by and large with community-based rights**. In that sense what has been decided by this Court earlier as ERP would not be of much help to us. For this reason, **the entire exercise done by the Karnataka High Court, in evaluating the rights of the Petitioners only on the touchstone of ERP, was incorrect**.

29. In the more recent case of ***Shayara Bano*** (supra) the majority opinion of 3:2 **held that Triple Talaq constitutes an irregular and not an essential practice amongst Sunni Muslims**. It was stated as follows:

> "54. …Applying the aforesaid tests, it is clear that Triple Talaq is only a form of talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi School which tolerates it. According to ***Javed***[16], therefore, this would not form part of any essential religious practice. Applying the test stated in ***Acharya Jagadishwarananda*** it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice…"

30. In the ***Sabarimala Temple*** (supra) case the question before the Constitutional Bench was whether women devotees between the ages of 10-50 years had the Right to enter the temple of Lord Ayyappa located in Sabarimala, Kerala. Subsequently, this Right was denied to them by the Temple Authorities, on the basis of customary practice and tradition. Allowing the Writ Petition by 4:1 majority, the bench **held in favour of women devotees and struck down the restrictions placed upon them to be violative of their Fundamental Rights under the Constitution of India.** {An egregiously wrong decision in our opinion - Ed.}

[16] ***Javed v State of Haryana***, (2003) 8 SCC 369 [cited in ***Shayara Bano*** *(supra)*]

31. In both the cases cited above again the essential determination before the Court was of religion and religious practice. Freedom of expression given to a citizen under Article 19(1)(a) was not an issue, and if at all it was it was on the periphery. In other words, not the central issue.

32. We are presently concerned with an entirely different set of facts. **We must deal with only Article 25(1), and not with Article 25(2), or even with Article 26 of the Constitution of India**. Article 25(1) deals with the Rights of an individual, whereas Article 25 (2), and Article 26 deal with the Rights of communities or religious denominations, as referred above. Additionally, we must deal with the Fundamental Rights given to an individual under Article 19(1)(a) and its interplay with Article 25(1) of the Constitution.

33. Article 25 gives a citizen the "freedom of conscience and free profession, practice and propagation of religion." It does not speak of Essential Religious Practice. This concept comes in only when we are dealing with Article 25(2) or Article 26, and where there is an inter-play of these two Articles.

34. We have before us **two children, two girl students, asserting their identity by wearing hijab, and claim protection under Article 19 and Article 25 of the Constitution of India.** ***Whether wearing hijab is an ERP in Islam or not is not essential for the determination of this dispute*****.** If the belief is sincere, and it harms no one else, there can be no justifiable reasons for banning hijab in a classroom.

35. The **Karnataka High Court**, however, has **made a detailed study as to what is ERP and whether wearing a hijab constitutes a part of ERP in Islam**. Suras and verses from the Holy Quran have been referred and explained, and then taking assistance of a commentary on the Holy Book, the High Court **concludes that wearing of hijab is not an essential religious practice in Islam and at best it is directory in nature, not mandatory**. The decisions of the Supreme Court which we have referred above, and some other decisions as well have been considered while dealing as to what constitutes an ERP, and then a determination has been made

that what is being claimed as a right is not an essential religious practice at all!

36. Apart from the fact that ERP was not essential to the determination of the dispute, which we have already said above, there is another aspect which is even more important, which would explain as to why the Courts should be slow in the matters of determining as to what is an ERP. In my humble opinion **Courts are not the forums to solve theological questions**. Courts are not well equipped to do that for various reasons, but most importantly because there will always be more than one viewpoint on a particular religious matter, and therefore nothing gives the authority to the Court to pick one over the other. The **Courts, however, must interfere when the boundaries set by the Constitution are broken, or where unjustified restrictions are imposed.**

37. In the case of ***M. Siddiq (Dead) Through LR's v. Mahant Suresh Das and Ors.***[17] popularly known as the ***Ram Janmabhoomi Case*** this Court had **cautioned not to venture into areas of theology with which the Courts are not well equipped**. There may be diversity of views within a religion and to choose one over others, may not be correct. **Courts should steer clear from interpreting religious scriptures**. It was observed by the Court as follows:

> "90. During the course of the submissions, it has emerged that the extreme and even absolute view of Islam sought to be portrayed by Mr. P.N. Mishra does not emerge as the only available interpretation of Islamic law on a matter of theology. Hence, in the given set of facts and circumstances, it is inappropriate for this Court to enter upon an area of theology and to assume the role of an interpreter of the Hadees. The true test is whether those who believe and worship have faith in the religious efficacy of the place where they pray. The belief and faith of the worshipper in offering namaz at a place which is for the worshipper a mosque cannot be challenged.♦ It would be preposterous for this Court to question it on the ground that a true Muslim would not offer prayer in a place which does not meet an extreme interpretation of doctrine selectively advanced by Mr. Mishra. **This Court, as a secular institution, set up under a constitutional regime must steer clear from choosing one among many possible interpretations of theological doctrine and must defer to the safer course of accepting the faith and belief of the worshipper.**'
>
> 91. Above all, the practice of religion, Islam being no exception, varies according to the culture and social context. That indeed is the strength of our plural society. Cultural assimilation is a significant factor which shapes the manner in which religion is practiced. In the plural diversity of religious beliefs as they are practiced in India, cultural assimilation cannot be construed as a feature destructive of religious doctrine. On the contrary, this process strengthens and reinforces the true character of a country which has been able to preserve its unity by accommodating, tolerating, and respecting a diversity of religious faiths and ideas. **There can be no hesitation in rejecting any attempt to lead the Court to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers. Nothing would be as destructive of the values underlying Article 25 of the Constitution. 18[18] '** **(emphasis supplied)**

38. In any case **as to what constitutes an Essential Religious Practice, in all its complexities, is a matter which is pending consideration before a Nine Judge Constitutional bench of this Court**[19] and therefore in any case it may not be proper for me to go any further into this aspect.

39. The decision which is of essential importance in this case for our purposes is the decision given by this Court in the case of ***Bijoe Emmanuel*** (supra). It is necessary to refer to this case in some detail, as in my opinion **this case is the guiding star which will show us the path laid down by the well-established principles of our Constitutional values, the path of understanding and tolerance, which we may also call as**

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[17] (2020) 1 SCC 1; Para 90 & 91

♦ Well, they offer namaz anywhere, even on roads and open lands, private or public, and so can they claim all those as mosques and as unchallengeable? - Ed.

[18] Paras 90 & 91 of the ***Ram Janmabhoomi*** case decision.

[19] ***Kantaru Rajeevaru vs Indian Young Lawyers Assn. and Ors.*** [R.P. (C) No. 3358 of 2018 in W.P. (C) No. 373 of 2006]

"reasonable accommodation," as explained by some of the lawyers before this Court. **Karnataka High Court**, all the same, **chose not to rely on this seminal Judgement** for reasons that "***Bijoe Emmanuel*** is **not the best vehicle for drawing a proposition essentially founded on the freedom of conscience**[20]." But this is not correct. **This decision of the Supreme Court is most relevant in the present case, *both on the facts as well as on law***.

40. Let us now look into the facts of that case:

Three girl children in Kerala who belonged to a faith called ***Jehovah's Witnesses***, were attending a government school. Every morning when the National Anthem was sung in the school these three students used to respectfully stand up for the National Anthem, like other children in the school; but they did not sing the National Anthem. They did so as their faith forbid them to sing for anyone else but Jehovah. Initially this was not noticed but then someone complained before the highest authority in the State, which led to the expulsion of these three children from their school, by orders passed by the Deputy Inspector of schools and then the Headmistress of the school. The children filed their Writ Petition before the Kerala High Court which was dismissed by the learned Single Judge as also their appeal by a division bench of Kerala High Court. They finally approached the Supreme Court of India and filed their Special Leave Petition before this Court. Their case was simple: they do not show disrespect to the National Flag or the National Anthem. They stand respectfully when the National Anthem is sung, they only do not participate in singing as they sincerely believe their faith forbids them to sing for anyone but Jehovah.

41. The Petition of these three girl children was dismissed by the Kerala High Court as the Kerala High Court did not find any word or thought in the Indian National Anthem which could offend anyone's religious susceptibilities. Hence the Kerala High Court concluded that there was absolutely no reason for the children not to sing the national anthem! While examining their case Justice O. Chinnappa Reddy, who wrote this Judgement for the Court rejected the approach of the High Court and said that the High Court had actually misdirected itself in doing so and it went off at a tangent. The **objection of the Petitioners was not to the language of the National Anthem, but they simply refused to sing any National Anthem, irrespective of any country** as they sincerely believe that this is what their religion prescribes them to do.

42. The Supreme Court then cites two judgements of the United States Supreme Court, which we must refer here as well, since they relate to schools and the 'discipline' imposed by the schools. The first is the case of ***Minersville School District v. Gobitis***[21] and the second is ***West Virginia State Board of Education v. Barnette***[22]. While referring to the two judgement(s) my source shall remain the Judgement of ***Bijoe Emmanuel*** (supra).

43. In ***Minersville*** (supra) the question was **whether compulsory saluting of the National Flag infringed upon the liberties guaranteed by the Fourteenth Amendment of the Constitution of the United States of America**. The majority opinion delivered by Justice Frankfurter upheld the requirement on grounds that such decisions are to be left to the school boards. Justice Stone gave his dissent and said, "History teaches us that there have been but few infringements of personal liberty by the State which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been dictated, as they are now, at politically helpless minorities[23]." In short, the **US Supreme Court did not interfere in the compulsory saluting of the National Flag in a Public School**. The reference of this case, is however, important here as **very soon this decision was overruled by the Supreme Court** in the case of ***Barnetta*** (supra) which is the second case.

[20] Para X1(iii) at Page 85 of the Impugned Judgement.

[21] 310 US 586 (1940)

[22] 319 US 624 (1943)

[23] Para 21 of ***Bijoe Emmanuel*** (supra)

44. The second case is the one which only a few years later, overruled ***Gobitis*** (supra). Justice Jackson, the author of the Judgement in ***Barnetta*** referred to the famous dilemma of Abraham Lincoln which was "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" Justice Jackson then said: "It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school…"

45. While going into the **logic of Justice Frankfurter of non-interference with the School Authorities, as that would make the Court a School Board**, Justice Jackson went onto say:

> "There are village tyrants as well as village Hampdens, but none who acts under colour of law is beyond the reach of the Constitution….. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgement that history authenticates as the function of this Court when liberty is infringed."

Justice Jackson then concludes:[24]

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

46. Justice O. Chinnappa Reddy in his Judgement has traced the struggles and the difficulties faced by the faithful of Jehovah in different countries where they had met similar restrictions. The Court then invokes Article 19(1)(a) and Article 25(1), in favor of the petitioners. It says:

> "Article 19(1)(a) of the Constitution guarantees to all citizens freedom of speech and expression, but Article 19(2) provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Article 25(1) guarantees to all persons freedom of conscience and the right freely to profess, practise and propagate religion, subject to order, morality and health and to the other provisions of Part III of the Constitution."

47. It was then **held that it is not disrespectful to the National Anthem if the girls respectfully stand when the National Anthem was sung, but may not have joined in the singing**. Their **expulsion from school was** therefore **held to be in violation of their Fundamental Right of Freedom of Speech and Expression given to them under Article 19(1)(a)** of the Constitution of India. The **Government Circular which directed that the entire school should sing National Anthem was not 'law' as given in Clause 2 of Article 19** of the Constitution. The law i.e., **the statutory law was 'The Prevention of Insults to National Honour Act, 1971'**. A person **who respectfully stands when the National Anthem is sung but does not participate in the singing does not commit an offence under the Act**. Offence is only committed when a person prevents another from singing National Anthem. The Court thus impliedly also meant that the **freedom to sing would also mean freedom to remain silent.**

48. **Article 25 of the Constitution**, was described as **an article of faith** and it was observed as follows:

> "18. …Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Article 25."

49. The **girls before us today face the same predicament as the Jehovah's Witnesses in the above**

[24] Para 22 of ***Bijoe Emmanuel*** (supra)

case. The **present Petitioners too wear hijab as an article of their faith. They too believe that it is a part of their religion and social practice**. In **my considered opinion** therefore, **this case is squarely covered by** the case of ***Bijoe Emmanuel*** (supra) and the ratio laid down therein.

50. Coming back to the order of Karnataka High Court there is another finding which is difficult to accept. This is where the **High Court determines that the Petitioners cannot assert their Fundamental Rights inside a classroom which the Court terms as "qualified public places" and the rights inside a school are only "derivative right."** The court states as under:

> "It hardly needs to be stated that schools are qualified public places that are structured predominantly for imparting educational instructions to the students. Such qualified Spaces by their very nature repeal the assertion of individual rights to the detriment of the general discipline and decorum. **Even the substantive rights themselves metamorphise into a kind of derivatives rights in such places.**"[25]

The Hight Court rejects the case of the Petitioners on 'reasonable accommodation,' and also the argument that schools are a showroom for diversity of culture, for reason that the schools being 'qualified public places' schoolgirls have to follow the dress code, which does not prescribe *hijab*. It says:

> "It hardly needs to be stated the content and scope of a right, in terms of its exercise are circumstantially dependent. Ordinarily, **liberties of persons stand curtailed inter-alia by his position, placement and the like**. The **extent of autonomy is enormous at home**, since **ordinarily residen[ce] of a person is treated as his inviolable castle**. However, **in qualified public places like schools, courts, war rooms, defense camp, etc., the freedom of individuals as of necessity, is curtailed** consistent with the discipline and decorum and function and purpose."[26]

51. Comparison of a school with a war room or defense camp, seems odd, to say the least. **Schools are not required to have the discipline and regimentation of a military camp.** Nevertheless, in my understanding, **what the High Court wanted to convey was that all public places have a certain degree of discipline and limitations and the degree of enjoyment of a Right by an individual inside his house or anywhere outside a public space is different to what he or she would enjoy once they are inside a public space. As a general principle, one can have no quarrel with this proposition**. But then let us come to the facts of the case. Laying down a principle is one thing, justifying that to the facts of a case is quite another. **We must be a judge of fact as well as a judge of law. Do the facts of the case justify the restrictions inside a classroom**, which is **admittedly a public place**? In my opinion there is no justification for this.

52. School is a public place, yet **drawing a parallel between a school and a jail or a military camp, is not correct**. Again, if the point which was being made by the High Court was regarding discipline in a school, then that must be accepted. It is necessary to have discipline in schools. But discipline not at the cost of freedom, not at the cost of dignity. **Asking a pre university schoolgirl to take off her *hijab* at her school gate, is an invasion on her privacy and dignity**. It is **clearly violative of the Fundamental Right given to her under Article 19(1)(a) and 21** of the Constitution of India. This **right to her dignity**[27] and **her privacy**[28] **she carries in her person**, even inside her school gate or when she is in her classroom. It is **still her Fundamental Right, not a "derivative right"** as has been described by the High Court.

53. In the ***Puttaswamy*** judgement (supra), Justice D.Y. Chandrachud in Paragraph 298 of his Judgement says as under:

> "298. **Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value**. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of

[25] Para XIV (iv) at Page 100 of the Impugned Judgement.

[26] Para XIV (vii) at Page 104 of the Impugned Judgement.

[27] ***Maneka Gandhi vs Union of India and Anr.*** [(1978) 1 SCC 248], Para 85

[28] ***K.S. Puttaswamy and Anr. vs Union of India and Ors.*** [(2017) 10 SCC 1].

life and liberty. **Liberty has a broader meaning of which privacy is a subset**. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. **Privacy enables the individual to retain the autonomy of the body and mind**. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. **Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it**, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. **Privacy lies across the spectrum of protected freedoms**. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, **the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised**. An individual **may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy**. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The **freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences**. Read **in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life** including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The **constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world.**♠ These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The **Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right**. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. **Privacy is the ultimate expression of the sanctity of the individual**. It is **a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.**"

54. The counsels representing the State before this Court had underlined the importance of G.O dated 05.02.2022 which was to enforce discipline in schools, including in Pre-University classes, and apply a dress code. The object of the act therefore was the betterment of education and to inculcate a sense of discipline among school going children. The learned Advocate General of Karnataka submitted that the law in the present case which is the G.O dated 5th February, 2022, is primarily for the enforcement of dress code in schools including Pre-University classes. It may only incidentally be giving an impact on the rights which the Petitioners claim under Article 19 and 25 of the Constitution of India. What has to be seen is the pith and substance of the law which is the enforcement of uniforms in schools, which in turn is to maintain discipline in schools. For this submission the learned Advocate General has relied upon ***Bachan Singh v. State of Punjab***[29] which says:

♠ In that case, for an extreme example, Digambar Jains would have a basic right and consequent freedom to go naked even in classrooms!? - Ed.

[29] (1980) 2 SCC 684

> "60. From a survey of the cases noticed above, a comprehensive test which can be formulated, may be restated as under:
>
> > "Does the impugned law, in its pith and substance, whatever may be its form and object, deal with any of the fundamental rights conferred by Article 19(1)? If it does, does it abridge or abrogate any of those rights? And even if it does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), is the direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights?"
>
> The mere fact that the impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid, must pass the test of reasonableness under Article 19. But **if the impact of the law on any of the rights under clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity**."

All the same, I do not see the applicability of the above submission in the facts of the controversy before this Court. The G.O specifically seeks to address the question of *hijab*, which is evident from the preamble of the G.O. Moreover, the above submission of the learned Advocate General is not correct in view of the ***Puttaswamy*** judgement (supra) which says:

> "24. The decisions in ***M.P. Sharma*** [***M.P. Sharma v. Satish Chandra***, AIR 1954 SC 300: 1954 Cri LJ 865: 1954 SCR 1077] and ***Kharak Singh*** [***Kharak Singh v. State of U.P.***, AIR 1963 SC 1295: (1963) 2 Cri LJ 329: (1964) 1 SCR 332] adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in ***Gopalan*** [***A.K. Gopalan v. State of Madras***, AIR 1950 SC 27: 1950 SCR 88] . This view stands abrogated particularly by the judgment in ***Cooper*** [***Rustom Cavasjee Cooper v. Union of India***, (1970) 1 SCC 248] and the subsequent statement of doctrine in ***Maneka*** [***Maneka Gandhi v. Union of India***, (1978) 1 SCC 248] . The decision in ***Maneka*** [***Maneka Gandhi v. Union of India***, (1978) 1 SCC 248], in fact, expressly recognised that it is the dissenting judgment of Subba Rao, J. in ***Kharak Singh*** [***Kharak Singh v. State of U.P.***, AIR 1963 SC 1295: (1963) 2 Cri LJ 329: (1964) 1 SCR 332] which represents the exposition of the correct constitutional principle. **The jurisprudential foundation which held the field sixty-three years ago in *M.P. Sharma*** [***M.P. Sharma v. Satish Chandra***, AIR 1954 SC 300: 1954 Cri LJ 865 : 1954 SCR 1077] and fifty-five years ago in ***Kharak Singh*** [***Kharak Singh v. State of U.P.***, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] **has given way to what is now a settled position in constitutional law**. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III."

55. We would now be examining some decisions of foreign Courts as in order to appreciate the assertion of religious and cultural rights in our school premises, it would be worthwhile to refer to some of the similar controversies which had come up before the Courts of other Countries which have a Constitutional Democracy. There are two cases which I would like to refer here. The first case is the '**nose-stud**' **case of the Constitutional Court of South Africa** and the **second one is a decision of the House of Lords in England.**

56. The South African case though has to be seen in the background of the Constitutional Law of South Africa where dignity is a right given to its citizens under its Constitution. Equality Courts have also been established in South Africa to hear the disputes relating to cases of discrimination. But nevertheless, the basic principle and the law remains the same.

57. Sunali was a student of Class 10 in Durban Girls High School (DGHS). The Code of Conduct of the school prohibited wearing jewellery in school. When Sunali was in class 10, her mother gave her a nose stud to wear, which was not a fashion statement, but a part of Sunali's Hindu-Tamil culture. The school objected to the nose-stud and Sunali was asked to remove it. When Sunali refused to remove the nose stud her mother was called. Her mother reasoned with the authorities that this is a part of her Hindu-Tamil culture and it cannot be removed. Ultimately, Sunali through her mother had to file a Petition before the Equality Court, where such matters of discrimination are heard since Sunali had alleged discrimination by her school. The Equality Court held that though a prima facie case for discrimination had been made out, it could not be termed as 'unfair'[30], thus dismissing her case. Thereafter, the matter was taken in appeal before the High Court which allowed her appeal and held that asking Sunali to remove her nose stud amounts to discrimination which is wrong. Both the school and the administration went to the Constitutional Court which heard the matter and again decided in favour of Sunali.

58. As to the **argument of the school that nose stud was not central to Sunali's religion or culture and it is only an optional practice**, this is what was said by the Constitutional Court, the Highest Court of South Africa:

> "86. The School further argued that the nose stud is not central to Sunali's religion or culture, but it is only an optional practice. I agree that the centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief. The essence of reasonable accommodation is an exercise of proportionality. Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they do not follow their belief. The difficult question is how to determine centrality. Should we enquire into centrality of the practice or belief to the community, or to the individual?
>
> 87. While it is tempting to consider the objective importance or centrality of a belief to a particular religion or culture in determining whether the discrimination is fair, that approach raises many difficulties. In my view, courts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgement of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices. If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way."

59. What was also pleaded on behalf of the School was **that the nose stud after all is a cultural and not a religious issue and therefore the infringement of any right, if at all, is much less**. This issue was dealt with as follows:

> "91. The next string of the School's centrality bow was that the infringement of Sunali's right to equality is less severe because the nose stud is cultural rather than a religious adornment. This was also the basis originally relied upon by the School for refusing the exemption and why it could recognise the stud's cultural significance without granting Sunali an exemption. To my mind the argument is flawed. As stated above, religious and cultural practices can be equally important to a persons' identity. What is relevant is not whether a practice is characterised as religious or cultural but its meaning to the person involved.
>
> 92. The School also argued that if Sunali did not like the Code, she could simply go to another school that would allow her to wear the nose stud. I cannot agree. In my view the effect of this would be to marginalise religions and cultures, something that is completely inconsistent with the values of our Constitution. As already noted, **our Constitution does not tolerate diversity as a necessary evil but affirms it as one of the primary treasures of our nation**. There may, however, be

[30] Para 14 at Page 14 of the Judgement

> occasions where the specific factual circumstances make the availability of another school a relevant consideration in searching for a reasonable accommodation. However, there are no such circumstances in this case and the availability of another school is therefore not a relevant consideration."

60. Ultimately what was held is given below as follows:

> "112. The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on the School. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. I would therefore confirm the High Court's finding of unfair discrimination."

61. The other case, which was also relied by the Karnataka High Court is ***Regina (SB) v. Governors of Denbigh High School***[31]**.** Primarily the controversy was that the school, allowed wearing of hijab, but what was further insisted was wearing of jilbab (which is more or less a burqa). Jilbab was denied and this led to the litigation where the restriction of the school on jilbab was upheld. In this background we must appreciate the observations of the Court, it was said:

> "But schools are different. Their task is to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential. This includes growing up to play whatever part they choose in the society in which they are living. The school's task is also to promote the ability of people of diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that. A uniform dress code can play its role in smoothing over ethnic, religious and social divisions. But it does more than that. Like it or not, this is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them. This particular school is a good school: that, it appears, is one reason why Shabina Begum wanted to stay there. It is also a mixed school. That was what led to the difficulty. It would not have arisen in a girls' school with an all female staff."

62. When a decision has to be made between school discipline and cultural and religious rights of minorities a balance has to be maintained. That is what was held. Baroness Hale of Richmond while elaborating on this issue referred to "Culture, Religion and Gender" (2003) by Professor Frances Raday the exact Paragraph at 98 which reads like this:

> "genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialized according to the implications of veiling while still attending public educational institutions ... A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girl's right to equality and freedom ... **On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions. In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends upon the balance between these two conflicting policy priorities in a specific social environment.**" **(emphasis supplied)**

[31] [2007] 1 AC 100

63. The Karnataka High Court has placed reliance upon two US Judgements passed by the District Courts there, that is **Miller v. Gills**[32] and **Christmas v. El Reno Board of Education**[33]. All the same the facts of these cases are different and in none of the two cases the action of the school authorities debarred students from attending their classes. There is another judgement relied upon by Karnataka High Court which is **Employment Division v. Smith**[34]. This is a US Supreme Court Judgement.

64. The facts of the case were quite different. The issue being examined was whether the State of Oregon was justified in denying unemployment benefits to persons who had been dismissed from their jobs owing to their consumption of "peyote," which had been classified as a 'controlled substance' (under the Controlled Substances Act, 1970), when it was being consumed as a part of religious beliefs. The consumption of peyote was admittedly a criminal offence. It was contended by the respondents that as it was only being consumed in pursuance of their religious belief and they would not be liable to be subjected to the applicable criminal law. This argument was rejected and it was held that if certain conduct (such as consumption of peyote), which is prohibited by law, then there would be no federal right to engage in such conduct. It was in this particular context of the applicability of the criminal law on an individual for a conduct already prohibited that such law was said to be 'facially neutral.' On this note, the following was stated:

> "13. …We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School, Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

65. Another question which the School Administration and the State must answer in the present case is as to what is more important to them: Education of a girl child or Enforcement of a Dress Code! We have been informed at the Bar by many of the Senior counsels appearing for the Petitioners, that the unfortunate fallout of the enforcement of hijab ban in schools in Karnataka has been that some of the girl students have not been able to appear in their Board examinations, and many others were forced to seek transfer to other schools, most likely madrasas, where they may not get the same standard of education. This is for a girl child, for whom it was never easy, in the first place, to reach her school gate.

66. One of the best sights in India today, is of a girl child leaving for her school in the morning, with her school bag on her back. She is our hope, our future. But it is also a fact, that it is much more difficult for a girl child to get education, as compared to her brother. In villages and semi urban areas in India, it is commonplace for a girl child to help her mother in her daily chores of cleaning and washing, before she can grab her school bag. The hurdles and hardships a girl child undergoes in gaining education are many times more than a male child. This case therefore has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would therefore put before itself is also whether we are making the life of a girl child any better by denying her education, merely because she wears a hijab!

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[32] 315 F. Supp. 94 (N.D. Ill. 1969)

[33] 313 F. Supp. 618 (W.D. Okla. 1970)

[34] 494 US 872 (1990)

67. All the Petitioners want is to wear a hijab! Is it too much to ask in a democracy? How is it against public order, morality or health? or even decency or against any other provision of Part III of the Constitution. These questions have not been sufficiently answered in the Karnataka High Court Judgement. The State has not given any plausible reasons either in the Government Order dated 5 February 2022, or in the counter affidavit before the High Court. It does not appeal to my logic or reason as to how a girl child who is wearing a hijab in a classroom is a public order problem or even a law-and order problem. To the contrary reasonable accommodation in this case would be a sign of a mature society which has learnt to live and adjust with its differences. In his famous dissent delivered in **United States v. Schwimmer**[35] Justice Oliver Wendell Holmes Jr., said as under:

> "22. ...if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate…"

68. A **girl child has the right to wear hijab in her house or outside her house, and that right does not stop at her school gate**. The child carries her dignity and her privacy even when she is inside the school gates, in her classroom. She retains her fundamental rights. To say that these rights become derivative rights inside a classroom, is wholly incorrect.

69. We live **in a Democracy and under the Rule of Law**, and the **Laws which govern us must pass muster the Constitution of India**. Amongst many facets of our Constitution, one is Trust. **Our Constitution is also a document of Trust. It is the trust the minorities have reposed upon the majority**. Commenting on the report of the Advisory committee on minorities, Sardar Vallabh Bhai Patel made a statement before the Constitute Assembly on 24 May 1949, which should be referred here. He said, "…. it is not our intention to commit the minorities to a particular position in a hurry. If they really have to come honestly to the conclusion that in the changed conditions of this country, it is in the interest of all to lay down real and genuine foundations of a secular State, then nothing is better for the minorities than to trust the good-sense and sense of fairness of the majority, and to place confidence in them. So also, it is for us who happened to be in a majority to think about what the minorities feel, and how we in their position would feel if we were treated in the manner in which they are treated."[36]

70. The question of diversity, raised by the Petitioners before the Karnataka High Court, was not considered by the Court since it was thought to be a 'hollow rhetoric,' and the submissions made by the lawyers on 'unity and diversity,' were dismissed as an "oft quoted platitude." This is what was said, "Petitioners' contention that a classroom should be a place for recognition and reflection of diversity of society, a mirror image of the society (socially and ethically) in its deeper analysis is only a hollow rhetoric, 'unity in diversity' being the oft quoted platitude…."[37]

71. The question of diversity and our rich plural culture is, however, important in the context of our present case. Our schools, in particular our Pre-University colleges are the perfect institutions where our children, who are now at an impressionable age, and are just waking up to the rich diversity of this nation, need to be counselled and guided, so that they imbibe our constitutional values of tolerance and accommodation, towards those who may speak a different language, eat different food, or even wear different clothes or apparels! **This is the time to foster in them sensitivity, empathy and understanding towards different religions, languages and cultures**. This is the time when they should learn not to be alarmed by our diversity but to rejoice and celebrate this diversity. **This is the time when they must realise that in diversity is our strength**.

72. The National Education Policy 2020, of the Government of India underlines the need for

[35] 279 US 644 (1929); Para 22

[36] 25 May 1949: Constituent Assembly Debates, Volume VIII

[37] Para XIV(v) at Page 101 of Impugned Judgement

inculcating the values of tolerance and understanding in education and making the children aware of the rich diversity of this country. The Principles of the Policy state that 'It aims at producing engaged, productive, and contributing citizens for building an equitable, inclusive, and plural society as envisaged by our Constitution.'

73. In the case of ***Aruna Roy v. Union of India***[38] **this Court had elaborated on the Constitutional Values of religious tolerance and diversity of culture and its need in our education system**. It was observed as follows by Justice Dharmadhikari in the concurring opinion authored by him:

> "25. …These need to be inculcated at appropriate stages in education right from the primary years. Students have to be given the awareness that the essence of every religion is common, only the practices differ…"

At another place in their judgement the court has said as under:

> "86. …The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstandings and intolerance inter se between sections of the people of different religions, faiths and belief. '**Secularism**', therefore, **is susceptible to a positive meaning that is developing and understanding and respect towards different religion**." (emphasis ours - Ed.)

74. A Constitutional Bench of this Court in ***Navtej Singh Johar and Ors. v. Union of India, Ministry of Law and Justice***[39] while speaking on diversity, dissent, liberty and accommodation spoke the following while delivering concurring opinions:

> "375. The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets; in the beliefs, ideas and ways of living of her citizens. Democratic as it is, out Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril."[40]

75. In the case of ***St. Stephen's College v. University of Delhi***[41] while delivering the majority opinion on behalf of the bench, Justice K Jagannatha Shetty held as follows:

> "81. Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character sectarian schools or colleges segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions."[42]

76. It is the Fundamental Duty of every citizen, under Part IV A of the Constitution of India to 'value and preserve the rich heritage of our composite culture.'[43]

77. Adverting to the Statutory Provisions applicable in this case, namely, the Karnataka Education Act, 1983 which is the source of the G.O. dated 05.02.2022 speaks inter-alia that the curriculum in schools and colleges must promote the rich and composite culture of our country.

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[38] (2002) 7 SCC 368

[39] (2018) 10 SCC 1

[40] Para 375, Concurring Opinion by Dr. Justice D.Y. Chandrachud, *(supra)*

[41] (1992) 1 SCC 558

[42] Para 81 *(supra)*

[43] Article 51A(f) of the Constitution of India

Section 7 of the above Act prescribes that one of the curriculum in the school can be "moral and ethical education" and then it further says that the school should also "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, and regional or sectional diversities to renounce practices derogatory to the dignity of women."

78. The preamble to the Constitution secures to all its citizens "LIBERTY of thought, expression, belief, faith and worship." It is the Preamble again which seeks to promote among them all, "FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation." The **Government Order dated 5 February, 2022, and the restrictions on the wearing of hijab, also goes against our constitutional value of fraternity and human dignity**. **Liberty, equality, fraternity**, the **triptych of the French Revolution is also a part of our Preamble**. It is true that whereas liberty and equality are well established, properly understood, and recognized concepts in politics and law, fraternity for some reasons has largely remained incognito. The framers of our Constitution though had a different vision. Fraternity had a different, and in many ways a much larger meaning with the main architect of our Constitution, Dr Ambedkar. In his own words: "my social philosophy may be said to be enshrined in these words: liberty, equality and fraternity. Let no one, however, say that I have borrowed my philosophy from the French Revolution. I have not. **My philosophy has roots in religion and not in political science. I have derived them from my Master, the Buddha**."[44] **Dr Ambedkar gave the highest place to fraternity as it was the only real safeguard against the denial of liberty or equality**. "These principles of liberty, equality and fraternity are not to be treated as separate items in trinity. They form a union of trinity in the sense that to diverse one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce a supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity liberty and equality could not become a natural course of things."[45]

79. Fraternity, which is our Constitutional value, would therefore require us to be tolerant, and as some of the learned Counsels would argue to be, reasonably accommodating, towards the belief and religious practices of others. We should remember the appeal made by Justice O. Chinnappa Reddy in ***Bijoe Emmanuel*** (supra) "Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it."

80. Under **our Constitutional scheme, wearing a *hijab* should be simply a matter of Choice**. It **may or may not be a matter of essential religious practice, but it still is, a matter of conscience, belief, and expression**. If she wants to wear hijab, even inside her classroom, she cannot be stopped, if it is worn as a matter of her choice, as it may be the only way her conservative family will permit her to go to school, and in those cases, her hijab is her ticket to education.

81. The unfortunate fallout of the hijab restriction would be that we would have denied education to a girl child. A girl child for whom it is still not easy to reach her school gate. This case here, therefore, has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would put before itself is also whether we are making the life of a girl child any better by denying her education merely because she wears a hijab!

82. Our Constitution has visualized a just society and it is for this reason that the first virtue that is secures for the citizens is 'Justice' which is the

[44] Ministry of Social Justice and Empowerment, Government of India, ***Dr. Babasaheb Ambedkar: Writings and Speeches***, 2020 (Vol XVII, Part III); Preface Accessed at https://www.mea.gov.in/Images/CPV/Volume17_Part_III.pdf

[45] **Speech of Dr. Ambedkar on 25 November 1949: Constituent Assembly Debates**, Volume XI.

(Go to p. 59→)

(2022) 2 LAW F-173 (UK-SC)

SUPREME COURT OF THE UNITED KINGDOM AT LONDON

Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998

(2022) 2 LAW F-173 **UKSC 31**

Date: **23 November 2022**

Justices

Lord REED (President), Lord LLOYD-JONES, Lord SALES, Lord STEPHENS and Lady ROSE

BACKGROUND TO THE APPEAL

The Scottish Government has drafted a Scottish Independence Referendum Bill which makes provision for a referendum on the question, "Should Scotland be an independent country?". Under the Scotland Act 1998 ("the **Scotland Act**"), the power of the Scottish Parliament to make legislation (or its "legislative competence") is limited. A provision of a Bill will be outside the legislative competence of the Scottish Parliament and therefore not law if it relates to the matters which have been reserved to the United Kingdom Parliament in Westminster (sections 29(1) and (2)(b)). These reserved matters include "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" (Schedule 5, paragraphs 1(b) and (c)).

In this reference, the Lord Advocate (the senior law officer of the Scottish Government) asks the Court whether the provision of the proposed Bill which provides for a referendum on Scottish independence would be outside the legislative competence of the Scottish Parliament because it relates to either or both of the reserved matters of the Union or the United Kingdom Parliament. This is a legal question about the Scottish Parliament's power to make legislation under the Scotland Act. The Court is not being and could not be asked to give a view on the distinct political question of whether Scotland should become independent from the rest of the United Kingdom.

The powers of the Scottish Parliament were not in issue during the 2014 referendum on Scottish independence. This is because, in 2013, an Order in Council under section 30(2) of the Scotland Act modified the definition of reserved matters to enable the Scottish Parliament to pass the 2014 referendum legislation. The United Kingdom Government is currently unwilling to agree to the making of another Order in Council to facilitate another referendum on Scottish independence.

The Lord Advocate's reference was made under paragraph 34 of Schedule 6 to the Scotland Act. The Advocate General for Scotland (the Scottish law officer of the United Kingdom Government) raises two preliminary issues, namely, whether the Court can and should answer the reference. There are consequently three questions which the Court must consider. First, is the question referred by the Lord Advocate a "devolution issue"? If not, it cannot be the subject of a reference under paragraph 34 of Schedule 6, which would mean that the Court does not have jurisdiction to decide it. Secondly, even if it is a devolution issue, should the Court exercise its discretion to decline to accept the reference? Thirdly, if the Court accepts the reference, how should it answer the question the Lord Advocate has referred to it?

JUDGMENT

In a unanimous judgment, the Court answers the questions before it as follows. First, the question referred by the Advocate General is a devolution issue, which means that that the Court has jurisdiction to decide it. Secondly, the Court should accept the reference. Thirdly, the provision of the proposed Bill which makes provision for a referendum on the question, "Should Scotland be an independent country?" does relate to matters which have been reserved to the Parliament of the United Kingdom under the Scotland Act. In particular, it relates to the reserved matters of the Union of the Kingdoms of Scotland and England and the Parliament of the United Kingdom. Accordingly, in the absence of

any modification of the definition of reserved matters (by an Order in Council or otherwise), the Scottish Parliament does not have the power to legislate for a referendum on Scottish independence.

REASONS FOR THE JUDGMENT

Issue 1: Is the question referred by the Lord Advocate a devolution issue?

Only a "devolution issue" can be referred to the Court under paragraph 34 of Schedule 6 to the Scotland Act. The **term "devolution issue" is defined by paragraph 1 of Schedule 6**. Under paragraph 1(f), it includes "any other question arising by virtue of this Act about reserved matters" [**13-14**]. The **Court concludes that the question referred by the Lord Advocate falls within this description and is therefore a devolution issue which the Court has jurisdiction to decide** [**47**]**.**

In reaching this conclusion, the Court holds, first, that the question referred is one "arising by virtue of" the Scotland Act because it is a question which arises under section 31(1) for the person wishing to introduce the Bill into the Scottish Parliament **[16]**. That person is required, on or before the Bill's introduction, to give a statement confirming that, in their view, the provisions of the Bill would be within the legislative competence of the Scottish Parliament **[9]**. Secondly, the existence of the separate scheme for the scrutiny of Bills for legislative competence by the Court in section 33 of the Scotland Act does not prevent a reference from being made under paragraph 34 of Schedule 6 in relation to a proposed Bill, before it is introduced **[21-27]**. Thirdly, the terms of paragraph 1(f) of Schedule 6 are very wide. They are intended to sweep up any questions arising under the Scotland Act about reserved matters which are not covered elsewhere **[37-42]**. Fourthly, it is consistent with the rule of law and with the intention of the Scotland Act that the Lord Advocate should be able to obtain an authoritative judicial decision on the legislative competence of the Scottish Parliament in advance of the introduction of a Bill **[44-46]**.

Issue 2: Should the Court decline to accept the Lord Advocate's reference?

The Court concludes that it should accept the reference **[54]**. The reference has been made in order to obtain an authoritative ruling on a question of law which has already arisen as a matter of public importance. The Court's answer will determine whether the proposed Bill is introduced into the Scottish Parliament. The reference is not therefore hypothetical, academic or premature **[53]**.

Issue 3: Does the proposed Bill relate to reserved matters?

The question whether the provision of the proposed Bill which provides for a referendum on Scottish independence would relate to matters which have been reserved to the United Kingdom Parliament under the Scotland Act (section 29(2)(b)) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances (section 29(3)) **[56-57], [70], [75]**.

A provision will relate to a reserved matter if it has something more than a loose or consequential connection with it **[57], [71-72]**. The purpose and effect of the provision may be derived from a consideration of both the purpose of those introducing the legislation and the objective effect of its terms **[73]**. Its effect is not restricted to its legal consequences **[74]**.

Applying this test, the reserved matters which are relevant here are "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" (Schedule 5, paragraphs 1(b) and (c)). The latter reservation includes the sovereignty of the United Kingdom Parliament **[76]**. The purpose of the proposed Bill is to hold a lawful referendum on the question of whether Scotland should become an independent country, that is, on ending the Union and the sovereignty of the United Kingdom Parliament over Scotland **[77], [82]**. The Bill's effect will not be confined to the holding of the referendum. Even if the referendum has no immediate legal consequences, it would be a political event with

important political consequences **[78-81]**. It is therefore clear that the proposed Bill has more than a loose or consequential connection with the reserved matters of the Union of Scotland and England and the sovereignty of the United Kingdom Parliament. Accordingly, the proposed Bill relates to reserved matters and is outside the legislative competence of the Scottish Parliament **[82-83], [92]**.

The Scottish National Party (intervening) made further written submissions founded on the right to self–determination in international law and the principle of legality in domestic law **[84]**. The Court rejects these submissions, holding that the right to self–determination is not in issue here **[88-89]** and does not require a narrow reading of "relates to" in section 29(2)(b) so as to limit the scope of the matters reserved to the United Kingdom Parliament under the Scotland Act **[90]**. Similarly, the allocation of powers between the United Kingdom and Scotland under the Scotland Act does not infringe the principle of legality **[91]**.

References in square brackets are to paragraphs in the judgment

Note: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online.

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SUPREME COURT OF THE UNITED KINGDOM AT LONDON

Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998

(2022) 2 LAW F-173 **UKSC 31**

Date: 23 November 2022

Michaelmas Term [2022] **UKSC 31**

JUDGMENT

REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998

before **Lord Reed, President, Lord Lloyd-Jones, Lord Sales, Lord Stephens & Lady Rose**

JUDGMENT GIVEN ON 23 November 2022

Heard on 11 and 12 October 2022

Appellant Dorothy Bain KC Tom Hickman KC Christine O'Neill KC Paul Reid (Instructed by Scottish Government Legal Directorate)

Respondent Sir James Eadie KC David Johnston KC Chris Pirie KCChristopher Knight (Instructed by the Office of the Advocate General for Scotland)

Intervener Claire Madison Mitchell KC David Welsh (Instructed by Livingstone Brown Limited (Glasgow City))

LORD REED, LORD LLOYD-JONES, LORD SALES, LORD STEPHENS AND LADY ROSE:

1. Does the Scottish Parliament have power to legislate for the holding of a referendum on Scottish independence? That is the subject-matter of a reference by the Lord Advocate, the senior Law Officer of the Scottish Government, to this court under paragraph 34 of Schedule 6 to the Scotland Act 1998 ("the Scotland Act"), as amended. But the Advocate General for Scotland, the Scottish Law Officer of the United Kingdom Government, has raised two preliminary issues. First, is the question referred by the Lord Advocate a "devolution issue"? If not, it cannot be the subject of a reference under paragraph 34

of Schedule 6. Secondly, even if the question is a devolution issue, should the court nevertheless decline to accept the reference in the exercise of its discretion?

2. There are accordingly three questions which the court must consider: first, **whether the question referred by the Lord Advocate is a devolution issue**; secondly, if it is, **whether the court should accept the reference**; and thirdly, **if so, how the question should be answered**. It is logical to consider the questions in that order, since if either of the first two questions receives a negative answer, the third question does not arise.

3. This is the judgment of the court. We begin by explaining the background to the reference (paras 4-11). We then set out the question referred (para 12). We then consider whether the question referred is a devolution issue (paras 13-47). We next consider whether the court should accept the reference (paras 48-54). We then consider how the question should be answered, addressing first the arguments presented by the Lord Advocate (paras 55-83), and then those presented by the Scottish National Party (paras 84-91). The **Scottish National Party has exceptionally been permitted to intervene, notwithstanding that it is the party forming the Scottish Government in which the Lord Advocate is a minister**, so that the court can consider a wide range of arguments. Finally, we give our answer to the question referred (para 92).

1. THE BACKGROUND TO THE REFERENCE

4. First, the background to the reference should be briefly explained. The **Scottish National Party, which is committed to Scottish independence, has formed the Scottish Government since 2007**.

5. In **2013 an Order in Council was made under section 30(2) of the Scotland Act so as to enable the Scottish Parliament to legislate for the holding of a *referendum on independence***. The Order in Council did so by modifying the definition of reserved matters in Schedule 5 to the Scotland Act. In particular, paragraph 1 of Schedule 5 provides:

> "The following aspects of the constitution are reserved matters, that is –
>
> (a) the Crown, including succession to the Crown and a regency,
>
> (b) the Union of the Kingdoms of Scotland and England,
>
> (c) the Parliament of the United Kingdom,
>
> (d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,
>
> (e) the continued existence of the Court of Session as a civil court of first instance and of appeal."

The Order in Council **inserted a new paragraph 5A into Schedule 5**, which provided that **paragraph 1 did not reserve a referendum on the independence of Scotland from the rest of the United Kingdom** if specified requirements were met. Paragraph 5A is no longer in force.

6. The **referendum** authorized by the Order in Council was **held in 2014**, and resulted in a **majority vote against independence**.

7. The **Scottish Government wishes to hold another referendum on independence**. The United Kingdom Government is unwilling to agree to the making of a further Order in Council under section 30(2) at the present time. In those circumstances, the Scottish Government wishes, if possible, to hold a referendum without an Order in Council, and therefore without any modification of the definition of reserved matters in Schedule 5.

8. Absent legislation by the United Kingdom Parliament, the **holding of a referendum requires authorization by an Act of the Scottish Parliament**. The **power of the Scottish Parliament to make legislation**, described in the Scotland Act as **its "legislative competence", is limited**. Section 29(1) of the Scotland Act provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. **Section 29(2) lists five circumstances in which a provision is outside legislative competence:**

> "(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or in breach of the restriction in section 30A(1),

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland."

In relation to section 29(2)(b), as was explained earlier, **reserved matters are defined in Schedule 5. Paragraph 1(b) and (c) of that Schedule reserve "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" respectively**: see para 5 above. If **legislation authorizing the holding of a referendum would relate to either or both of those matters**, it would accordingly **relate to a reserved matter**, and be **outside the legislative competence of the Scottish Parliament.**

9. Sections 31 to 33 of the Scotland Act provide for the scrutiny of Bills in order to check that they are within legislative competence. It will be necessary to consider these provisions in some detail. For present purposes, it is sufficient to note the terms of section 31(1):

"A person in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament."

In the case of a Bill introduced by the Scottish Government, paragraph 3.4 of the Scottish Ministerial Code requires that the statement under section 31(1) must have been cleared with the Law Officers.

10. A **Scottish Independence Referendum Bill has been drafted by the Scottish Government**. The **present reference arises because the Lord Advocate considers that she would be unlikely to have the necessary degree of confidence that the Bill does not relate to a reserved matter to clear a Ministerial statement** under section 31(1) that the Bill is within the legislative competence of the Scottish Parliament. **Given the importance of the issue to the Scottish Government, the Lord Advocate was requested by the First Minister to consider referring the question whether the Bill would be within the legislative competence of the Scottish Parliament to this court** for decision. The Lord Advocate agreed to make such a reference.

11. The reference has been made under paragraph 34 of Schedule 6 to the Scotland Act, which provides:

"The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings."

2. The question referred

12. The question referred is:

"Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country*?'* relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (paragraph 1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (paragraph 1(c) of Schedule 5)?"

3. Is the question referred a devolution issue?

13. **Only a "devolution issue" can be referred to this court under paragraph 34 of Schedule 6**. The expression "devolution issue" is defined by paragraph 1 of Schedule 6. So far as material, paragraph 1 provides:

"In this Schedule 'devolution issue' means –

(a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,

(b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,

(c) a question whether the purported or proposed exercise of a function by a

member of the Scottish Government is, or would be, within devolved competence,

(d) a question whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or in breach of the restriction in section 57(4),

(e) a question whether a failure to act by a member of the Scottish Government is incompatible with any of the Convention rights,

(f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters."

14. The **Lord Advocate relies on the final words of paragraph 1(f)**:

"any other question arising by virtue of this Act about reserved matters."

She maintains **that the question which she has referred falls within that description. The Advocate General maintains that it does not**. His arguments in support of that position can be considered under four headings.

(1) The Advocate General's first argument: "arising by virtue of this Act", or by virtue of the Scottish Ministerial Code?

15. The first argument advanced by counsel for the Advocate General responds to the Lord Advocate's submission that the question she has referred is one "arising by virtue of this Act", as required by paragraph 1(f), because it arises in the course of her performance of her function under the Scottish Ministerial Code of advising the Scottish Government, and in particular the minister in charge of the Bill, on whether the statement required by section 31(1) of the Scotland Act can be made. In response, counsel for the Advocate General point out that the Scotland Act contains no provision requiring the Lord Advocate to advise ministers in relation to statements made under section 31(1). Since the Lord Advocate's function in relation to such statements is not prescribed by the Scotland Act, a question arising in the course of performing that function is not, they submit, one "arising by virtue of this Act". A requirement imposed by the Scottish Ministerial Code has no bearing on paragraph 1(f), since neither the existence nor the terms of the Code is prescribed by the Scotland Act.

16. These points are fairly made in response to the way in which the Lord Advocate initially put her case, but they are not fatal to her position as it developed, in response to questions from the bench, during the course of the hearing. As she came to accept, her role under the Scottish Ministerial Code does not bear on the present issue. Whether a question is one "arising by virtue of this Act" does not depend on whether the Lord Advocate is required by the Scotland Act to answer it. The question whether the provisions of a Bill would be within the legislative competence of the Scottish Parliament is one "arising by virtue of this Act" (subject to the other arguments advanced on behalf of the Advocate General), since it is a question which arises under section 31(1) for the person wishing to introduce the Bill, whether that be a minister or a private member. Provided the question is about reserved matters, as required by paragraph 1(f) of Schedule 6, the Lord Advocate is entitled to refer it to this court under paragraph 34 (subject, again, to the other arguments advanced on behalf of the Advocate General).

(2) The Advocate General's second argument: the scheme of legislative scrutiny established by sections 31 and 33 would be undermined

17. Sections 31 and 33 of the Scotland Act set out a number of provisions concerned with the scrutiny of Bills in order to assess whether they are within the legislative competence of the Scottish Parliament.

18. Section 31, headed "Scrutiny of Bills for legislative competence and protected subject-

matter", imposes obligations upon the person who wishes to introduce a Bill and upon the Presiding Officer of the Scottish Parliament. As has been explained, section 31(1) requires that the person in charge of a Bill must make a statement, on or before the introduction of the Bill in the Scottish Parliament, that in his or her view the provisions of the Bill would be within the legislative competence of the Scottish Parliament. In addition, section 31(2) requires that the Presiding Officer must decide, on or before the introduction of a Bill in the Scottish Parliament, whether or not in his or her view the provisions of the Bill would be within the legislative competence of the Scottish Parliament, and state his or her decision.

19. Section 33, headed "Scrutiny of Bills by the Supreme Court (legislative competence)", confers upon certain Law Officers the power to refer certain questions of legislative competence to this court. In particular, section 33(1) provides:

> "The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision."

The generality of that provision is, however, cut down by section 33(2), which provides:

> "Subject to subsection (3), he may make a reference in relation to a Bill at any time during –
>
> (a) the period of four weeks beginning with the passing of the Bill, and
>
> (b) any period of four weeks beginning with any approval of the Bill in accordance with standing orders made by virtue of section 36(5)."

Subsection (3) is immaterial to the present proceedings. Subsection 2(b) addresses the situation where a Bill has been approved by the Scottish Parliament following its reconsideration after this court's decision on a reference under section 33(1).

20. Counsel for the Advocate General argue that it would be surprising if the United Kingdom Parliament had set up a scheme for the reference of Bills under section 33, but had simultaneously enabled the Law Officers to make references of Bills or proposed Bills outside that scheme. The view that section 33 provides the only method of scrutinising a measure for legislative competence prior to Royal Assent is, they submit, supported by a number of considerations, including the following:

(1) The definition of devolution issues in paragraph 1 of Schedule 6 refers to Acts of the Scottish Parliament but contains no reference to Bills or proposed Bills.

(2) The Notes on Clauses which accompanied the Scotland Bill when it was considered by the United Kingdom Parliament, and were published online and in hard copy, state, in relation to paragraph 34 of Schedule 6:

> "Paragraph 34 provides that all the principal Law Officers may refer to the Judicial Committee [whose devolution jurisdiction was inherited by the Supreme Court] any devolution issue which is not the subject of proceedings. This power enables the Law Officers to refer any vires question to the Judicial Committee even although it is not the subject of a judicial dispute and *has not arisen in proceedings on a Bill*."
>
> (emphasis added)

Counsel submit that the words which we have italicised indicate a lack of intention on the part of the United Kingdom Parliament that questions about Bills should be referable under paragraph 34.

(3) The United Kingdom Parliament, they submit, clearly did not intend that a Bill could be referred under paragraphs 1(f) and 34 of Schedule 6 after it has been introduced in the Scottish Parliament,

yet the Lord Advocate's analysis lacks an explanation of why that is not possible on her interpretation of Schedule 6. Concurrent methods of raising the same or similar points would, they submit, be a recipe for chaos.

(4) References under the closing words of paragraph 1(f) of Schedule 6 are limited to questions about reserved matters. But the limits upon the legislative competence of the Scottish Parliament are not confined to reserved matters: that is only one of five limitations imposed by section 29(2) (see para 8 above). The Lord Advocate's interpretation of paragraph 1(f) would therefore result in a bifurcation of issues arising in relation to the Scottish Parliament's legislative competence (we shall refer to this argument as "the bifurcation point"). Issues relating to reserved matters could, on her interpretation, be considered on a reference under paragraphs 1(f) and 34 of Schedule 6 at the stage when a Bill was in draft, but other issues relating to legislative competence could only be referred under section 33 after the Bill had been passed. It is hard, counsel submit, to identify any purpose which the United Kingdom Parliament might have intended by this bifurcation, and the Lord Advocate does not attempt to do so.

(5) The terms of an Act passed by the Scottish Parliament may differ from those of a proposed Bill referred under paragraphs 1(f) and 34 of Schedule 6. For that reason also, there could be a further reference under section 33. The Lord Advocate does not explain why the United Kingdom Parliament would have imposed such a potential burden on the finite resources of the court.

(6) The Lord Advocate's approach also gives rise to the surprising consequence that Law Officers of the United Kingdom Government, who are given the same power to make a reference under paragraph 34 of Schedule 6 as the Lord Advocate, can make a pre-emptive reference of whether a legislative proposal by the Scottish Government is outside legislative competence because it relates to reserved matters, rather than waiting for the appropriate moment under section 33.

21. These submissions raise a number of matters of importance, particularly as regards the relationship between references under paragraphs 1(f) and 34 of Schedule 6, on the one hand, and under section 33, on the other.

22. We accept that a reference cannot be made under paragraphs 1(f) and 34 after a Bill has been introduced in the Scottish Parliament. As we have explained, section 33(1) confers a power on Law Officers to refer a question of legislative competence in relation to a Bill to this court, but section 33(2) then confines that power to a specified period after the passing of the Bill or its approval following an earlier reference. The clear implication is that it is only during those specified periods that a reference to this court can be made in respect of a Bill once it has been introduced. As was pointed out in *Keatings v Advocate General for Scotland* [2021] CSIH 25; 2021 SC 329, para 61, the time limits imposed on references by Law Officers under section 33(2) would be rendered nugatory if they could make a reference under another provision of the Scotland Act during the Bill's passage through the Scottish Parliament.

23. However, it does not follow that a reference cannot be made under paragraphs 1(f) and 34 of Schedule 6 before a Bill is introduced. As counsel for the Advocate General accepted, section 33 is not inconsistent with the existence of a power to refer a question relating to proposed legislation under paragraphs 1(f) and 34 prior to the introduction of a Bill.

24. We also accept that a bifurcation of issues relating to legislative competence is liable to arise if questions about reserved matters can be referred under paragraphs 1(f) and 34 of Schedule 6, since other issues affecting legislative competence cannot be so referred. The consequent possibility of consecutive references raising different issues in relation to the same Bill – first, a reference of questions about reserved matters under paragraphs 1(f) and 34 prior to the introduction of the Bill, and secondly a reference of other aspects of legislative competence under section 33 after the Bill has been passed - is a relevant consideration in construing Schedule 6. However, it is not necessarily a sufficient reason for cutting down the amplitude of the language used in paragraph 1(f) ("any other question arising by virtue of this Act about reserved matters"), particularly since the issue might be addressed through the exercise of the court's discretion to decline to accept a reference under paragraph 34. The same can be said of the argument that a reference under paragraphs 1(f) and 34 might conceivably be followed by a further reference under section 33 in the event that a Bill were to be amended during its passage through the Scottish Parliament so that it raised a further question as to whether it related to a reserved matter.

25. The other arguments advanced by counsel for the Advocate General are less cogent. First, the fact that paragraph 1 of Schedule 6 contains no reference to Bills is not necessarily significant, given that the terms of paragraph 1(f) are wide enough to include questions relating to proposed Bills.

26. Secondly, the statement in the Notes on Clauses does not advance the argument. The statement that paragraph 34 enables the Law Officers to refer "any vires question" could hardly be wider, and would cover the present reference. The following words, "even although it is not the subject of a judicial dispute and has not arisen in proceedings on a Bill", do not cut down the width of that statement. We do not, however, attach particular weight to the Notes on Clauses. The document was drafted by Government officials and has no endorsement by the United Kingdom Parliament. It is much less significant than the language carefully chosen by the Parliamentary drafter and enacted by Parliament. Furthermore, paragraph 1(f) of Schedule 6 did not form part of the Bill at the time when the Notes on Clauses were produced, and the document does not therefore refer to it. 27. Thirdly, we see nothing anomalous about the possibility that United Kingdom Law Officers, as well as the Lord Advocate, might refer a question about reserved matters relating to a legislative proposal, if such a reference can be made under paragraphs 1(f) and 34. Similarly, we accept as the Lord Advocate did, that if her construction of the scope of paragraph 1(f) is right, then it must apply equally to the power in paragraph 4 of Schedule 6 to institute proceedings for the determination of a devolution issue in the Scottish courts. Again, we see nothing anomalous in the Law Officers having a parallel power to choose the appropriate forum for the determination of a particular issue. Neither of these powers creates a risk of frivolous or disruptive litigation given that the Law Officers can be expected to exercise the power only in appropriate circumstances.

(3) The Advocate General's third argument: an alternative construction of paragraph 1(f)

28. The Advocate General's third argument focuses on the fact that paragraph 1(f) includes any "other" questions about devolved competence, "other" questions in or as regards Scotland and "other" questions about reserved matters and asks the question "other than what?" The argument relates each component within paragraph 1(f) to the preceding paragraphs 1(a) to (e). Paragraphs 1(a) to (e) bring within the term "devolution issue" questions arising about devolved competence, in or as regards Scotland and reserved matters in particular contexts within the Scotland Act. So, the Advocate General argues, one must identify what else in that Act might need to be included by paragraph 1(f) as a

devolution issue "other" than questions already covered by the first five sub-paragraphs.

29. In order to understand the Advocate General's third argument, it is helpful to break down paragraph 1(f) into its component parts, using notional sub-sub-paragraphs, as follows:

> "(f) (i) any other question about whether a function is exercisable (A) within devolved competence or (B) in or as regards Scotland and (ii) any other question arising by virtue of this Act about reserved matters."

Following that notional annotation, this reference is concerned with the interpretation of paragraph 1(f)(ii).

30. Looking first at paragraph 1(f)(i)(A), Counsel for the Advocate General seek to identify the questions about whether a function is exercisable within devolved competence which might need to be covered by paragraph 1(f)(i)(A) because they are not already covered by paragraph 1(a)-(e), and in particular by paragraph 1(c), which already covers questions about whether the exercise of a function by a member of the Scottish Government would be within devolved competence.

31. Counsel for the Advocate General submit that there are a number of provisions of the Scotland Act (sections 92(4)(c), 104(2)(c) and 106(2)(b)) which employ the phrase "within devolved competence" in defining the powers of bodies other than the Scottish Government. The exercise of powers under those provisions does not fall within the ambit of paragraph 1(c) of Schedule 6, because paragraph 1(c) brings within the definition of "devolution issue" only questions whether the purported or proposed exercise of functions by members of the Scottish Government is or would be within devolved competence.

32. Against that background, counsel submit that paragraph 1(f)(i)(A) is concerned with questions arising under the provisions listed in para 31 above, ie questions about whether a function is exercisable within devolved competence by persons other than members of the Scottish Government. Although the language of paragraph 1(f)(i)(A), if considered in isolation, is also capable of covering questions concerning the exercise of functions within devolved competence by members of the Scottish Government, such questions are likely to fall within paragraph 1(c), and therefore to be excluded from the scope of paragraph 1(f)(i)(A) by the word "other", in the phrase "any other question". Given that the inclusion of the word "other" in paragraph 1(f)(i)(A) is intended to restrict that provision to functions which are not already included in paragraph 1(c), that provision must be given a more focused meaning, restricted to those provisions of the Scotland Act where it is needed.

33. Counsel next follow the same process of reasoning in relation to paragraph 1(f)(i)(B). The phrase "in or as regards Scotland" is used, in the context of a definition of limited powers, in a number of provisions in the Scotland Act, besides its use in defining legislative competence in section 29(2)(a), and hence its use, through its incorporation by section 54, in defining devolved competence. In particular, they submit, it is used in relation to functions other than those of members of the Scottish Government in sections 56(4)(a), 63(1), 88(6), 90(1) and 106(2)(a), and in paragraph L2 of Schedule 5. Against that background, they submit that paragraph 1(f)(i)(B) is concerned with questions arising under those provisions, because it is only those questions which are "other" than questions already within the definition under paragraph 1(c). Although paragraph 1(f)(i)(B) is also capable of covering questions concerning the exercise of functions in or as regards Scotland by the Scottish Ministers, such questions are likely to fall within paragraph 1(c), and therefore to be excluded from the scope of paragraph 1(f)(i)(B) by the word "other".

34. Counsel next follow the same process of reasoning in relation to paragraph 1(f)(ii). The phrase "reserved matters" is used, in the context of a definition of limited powers, in a number of provisions of the Scotland Act, besides its use in defining legislative competence in section 29(2)(b), and hence its use, through its incorporation

by section 54, in defining devolved competence. In particular, they submit, it is used in relation to non-legislative powers of the Scottish Parliament in sections 23(5) and (6), and in relation to United Kingdom ministers and cross-border public authorities in sections 56(4)(a), 58(4)(b), 88(2)(b) and (6), and 91(3)(d). Against that background, they submit that paragraph 1(f)(ii) is concerned only with questions arising under those provisions, and not with questions relating to the legislative competence of the Scottish Parliament, which are intended to arise only under section 33, after a Bill has been passed, or under paragraph 1(a) of Schedule 6, after legislation has been enacted.

35. Counsel submit that that interpretation of paragraph 1(f) is supported by the Explanatory Notes on the Scotland Act, which state in relation to that sub-paragraph:

> "The questions swept up into this sub-paragraph can arise in various circumstances. For example, there could be a question whether Her Majesty is making an Order in Council within devolved competence (see note on section 118) or whether a function is exercisable 'in or as regards Scotland' so that it may transfer by an order under section 63 or whether a public body is a Scottish public authority whose functions are exercisable only 'in or as regards Scotland' (see definition in section 126(1)) or whether the functions of a body relate to a reserved matter (see section 126(3))."

Counsel point out that all of the examples given, apart from the last, fall under paragraph 1(f)(i), and concern the functions of bodies other than the Scottish Government.

36. Since, on counsel's analysis, paragraph 1(f)(ii) is not concerned with the legislative competence of the Scottish Parliament, they submit that it follows that the question referred by the Lord Advocate falls outside the scope of that provision.

37. We are not persuaded by this submission. The terms of paragraph 1(f) are very wide: "*any other question* about whether a function is exercisable within devolved competence or in or as regards Scotland and *any other question* arising by virtue of this Act about reserved matters" (emphasis added). When paragraph 1(f) is seen in its context, following paragraph 1(a) to (e), it has the appearance of a sweeping-up provision, designed to supplement the more precise provisions which precede it, so as to ensure that no gap is left. So understood, it ensures that it is possible for every conceivable question about whether a function is exercisable within devolved competence or in or as regards Scotland, and every conceivable question about reserved matters, to be decided by the courts. In particular, the words "any other question" would naturally be interpreted as meaning "any question, other than one falling within paragraph 1(a) to (e)", and therefore as covering any question about reserved matters which is not covered by those provisions. It is understandable that the United Kingdom Parliament should have provided a means of ensuring that every such question is justiciable, since there could otherwise be situations where a limit on the exercise of a function could not be authoritatively determined.

38. That reading of paragraph 1(f), in accordance with the ordinary meaning of the words used, is consistent with the courts' general approach to the interpretation of the Scotland Act, as explained, for example, by Lord Hope (with whom the other members of the court agreed) in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153 ("*Imperial Tobacco*"), para 14:

> "The best way of ensuring that a coherent, stable and workable outcome is achieved is **to adopt an approach to the meaning of a statute that is constant and predictable**. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

We also note that Lord Hope said at para 33 of the same case that it would be wrong to pay any regard to the Explanatory Notes on the Scotland Act, which were produced by officials several

years after the legislation had been enacted, and therefore did not form any part of the contextual scene of the statute.

39. Construing paragraph 1(f) according to the ordinary meaning of the words used is also consistent with the important function which paragraph 1 plays in the overall scheme of the Scotland Act. It is by no means limited to defining the scope of references to this court. Devolution issues can arise in any civil or criminal proceedings in any court or tribunal in Scotland (Part II of Schedule 6), England and Wales (Part III) or Northern Ireland (Part IV), as well as being the subject of a reference by a Law Officer to this court (Part V). The definition of a devolution issue in paragraph 1 is the key to the raising before any court or tribunal, anywhere in the United Kingdom, of any question arising under the Scotland Act, other than (since 2013) a question in relation to a compatibility issue as defined by section 288ZA of the Criminal Procedure (Scotland) Act 1995, as amended (which concerns certain questions arising in criminal proceedings in relation to Convention rights, ie rights and freedoms guaranteed by the European Convention on Human Rights, and retained EU law).

40. All of these considerations point towards treating the provisions mentioned in para 34 above as examples of provisions under which questions can arise about reserved matters, but not as being the only possible examples. In particular, reserved matters also feature in the definition of the legislative competence of the Scottish Parliament; and questions about that aspect of legislative competence may arise which do not concern enacted legislation or Bills which have been introduced in the Scottish Parliament, and do not therefore fall within the ambit of paragraph 1(a) or of section 33. The Lord Advocate maintains that the present case concerns a question of that kind.

41. In response, counsel for the Advocate General again raise the bifurcation point, and ask why, if questions of that kind about reserved matters were intended to fall within paragraph 1(f), that provision does not also extend to all the other aspects of legislative competence. There is undeniable force in this objection, and possible explanations of why the draftsman might have singled out reserved matters would be speculative. Nevertheless, a lack of tidiness in legislation is not unknown, and the fact that a particular interpretation would have an untidy outcome is not a fatal objection if that construction is nevertheless the most persuasive.

42. In short, (1) the breadth of the language used by the United Kingdom Parliament in paragraph 1(f), (2) the courts' general approach to the construction of the Scotland Act, (3) the apparent purpose that the provision should sweep up any questions arising under the Act about reserved matters which are not covered by paragraphs 1(a) to (e), and (4) the critical role of paragraph 1(f) in relation to justiciability, all incline us to construe paragraph 1(f) in accordance with the ordinary meaning of the words used, rather than as being concerned only with the non-legislative powers of the Scottish Parliament and with the functions of United Kingdom ministers and cross-border public authorities.

(4) The Advocate General's fourth argument: why should there be a power to refer questions which the Lord Advocate is able to answer?

43. Counsel for the Advocate General submit that if the Scottish Government requires ministers to be guided by legal advice from the Law Officers when deciding whether they can make the statement required by section 31(1), and if, **as in the present case, the Lord Advocate is not satisfied that a Bill would be within legislative competence, then the result is that the Bill cannot be introduced**. It is, they submit, hard to see why this should be a matter of legal concern. The United Kingdom Parliament, they submit, would not have intended the resources of the court to be taken up with references by the Lord Advocate of provisions which she herself cannot confirm to be within legislative competence.

44. We are **not persuaded by this argument. Law Officers perform an important role in providing legal advice to government, but they are not infallible.** Further, as pointed out at paras 9 and 15-16 above, the person who has to form and state the opinion referred to in section 31(1) is the person in charge of a Bill, who may be either a minister or a private member. They too are not infallible when considering an issue of law regarding legislative competence. Moreover, the Law Officers, a minister or a private member (as the case may be) may believe that there is a reasonably arguable case that a Bill is within legislative competence, while not being sufficiently confident to be able to state positively that it is, being mindful that this is ultimately a question of law which only a court can resolve. However, following the practice set out in the Scottish Ministerial Code, a Scottish Government Bill cannot be introduced, however important it may be politically, unless the Lord Advocate is satisfied that its provisions would be within the legislative competence of the Scottish Parliament. If the Lord Advocate is not so satisfied, the Bill will not be introduced, and no reference can be made under section 33. But **the Lord Advocate may be mistaken, with the consequence that a legitimate and politically important proposal for legislation will never see the light of day**. The same position may arise in relation to a Bill introduced by a private member. Accordingly, **it would be impossible to establish that a Bill which might in fact be within legislative competence** (and as to which a Law Officer or its introducer thought there was a reasonable argument that it was within competence) **was a proper and legitimate Bill fit to be passed by the Scottish Parliament.**

45. It **would be more consistent with the rule of law and with the intention of the Scotland Act that the Scottish Parliament should be able to exercise its powers where it has legislative competence for the Lord Advocate** (if necessary, in the case of a private member's Bill, by acting at the request of that member) **to be able to obtain an authoritative judicial decision on the point**. Admittedly, only a decision on the scope of reserved matters can be obtained under paragraphs 1(f) and 34 of Schedule 6. **Other aspects of legislative competence cannot be referred under those provisions**. However, if legislation were construed so as to exclude anything short of a perfect solution, the best would indeed be the enemy of the good.

46. In confining the power to make a reference to Law Officers, the United Kingdom Parliament could also be confident that such references would be made responsibly in the public interest. That confidence is borne out by the fact that this is the first occasion on which a reference has been made by the Lord Advocate since the Scotland Act came into force 23 years ago. It is also the first occasion on which any Law Officer has referred a question in respect of a proposed Bill under any of the devolution statutes. Any risk that the court's resources might be unduly absorbed by such references is also mitigated by its discretion to decline to accept them.

47. For these reasons, we **conclude that the question referred is a devolution issue**, and that **this court accordingly has jurisdiction to decide it.**

4. Should the court decline to accept the reference?

48. On two occasions in the past, this court has declined to decide questions referred to it by the Attorney General for Northern Ireland under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998, which is the provision corresponding to paragraph 34 of Schedule 6 to the Scotland Act, on the basis that it possesses an inherent discretion to do so. Counsel for the Advocate General submit that the court should exercise its discretion to decline to decide the question which is the subject of the present reference.

49. The two references from Northern Ireland were very different from the present case. In the first of those cases, ***Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998*** [2019] UKSC 1; [2020] NI 793, the court adjourned the reference in circumstances where inter partes proceedings were pending which would allow

most if not all of the issues to be raised, and in which the Attorney General had the power to intervene and make a reference. Lord Kerr, giving the judgment of the court, explained that it was generally desirable that legal questions should be determined against the background of a clear factual matrix rather than as theoretical issues of law. 50. In the second case, ***Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998*** [2020] UKSC 2; [2020] NI 820, the Attorney General sought to challenge the compatibility of United Kingdom legislation with Convention rights, by referring a question concerning the issuing by the devolved administration of lists of postcodes which were incorporated by reference into the commencement order made by the United Kingdom Government. The United Kingdom legislation was the subject of a direct challenge in other proceedings in England and Wales. The court refused to accept the reference on two grounds. First, it was said, the court must retain a discretion whether to deal with a reference on a devolution issue where that issue is to be raised in proceedings where the claimed incompatibility of the measure with Convention rights occupies centre stage, as opposed to its appearance via a side wind. Secondly, it was said, although the production of the postcode lists was an act of a devolved institution, the relative isolation of that act from the introduction of the United Kingdom legislation threw into stark relief the inappropriateness of regarding the preparation of the lists as an act sufficient to give rise to a devolution issue.

51. Neither of the Northern Ireland cases arose in the same circumstances as the present case, but counsel for the Advocate General submit that they demonstrate that the court can decline to accept a reference where it is not an appropriate vehicle for the determination of the issue in question. They argue that that is also the position in the present case, particularly for the following reasons:

(1) Any Bill introduced into the Scottish Parliament may not be in the same terms as the proposed Bill presently before the court, with the consequence that the court's decision in respect of the proposed Bill may not be determinative. A further reference would then be necessary under section 33.

(2) Any Bill introduced into the Scottish Parliament may be amended during its passage, with the same consequence.

(3) The present reference cannot deal with issues of legislative competence which fall outside the scope of paragraph 1(f), such as whether a Bill providing for a referendum on Scottish independence would be incompatible with section 28(7) of the Scotland Act, which protects the power of the United Kingdom Parliament to make laws for Scotland.

(4) A practical problem in assessing whether the provisions of a proposed Bill would relate to reserved matters arises from the absence of the policy memorandum and other documents which would accompany a Government Bill on its introduction into the Scottish Parliament. Such documents can be taken into account in identifying the purpose and effect of legislation, as required by section 29(3) of the Scotland Act (set out at para 57 below): *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40, para 25.

(5) It is inappropriate, they submit, for the Lord Advocate to treat this court as a legal advice centre. It is a normal aspect of the responsibilities of a Law Officer to provide legal advice to government on her own responsibility. The substantive question in the present case is, they submit, not even one of particular difficulty.

52. In support of that submission, counsel cite ***Yalland v Secretary of State for Exiting the European***

Union [2017] EWHC 630 (Admin). That case concerned challenges by a number of individuals to a decision by the United Kingdom Government to leave the European Economic Area. The proceedings were brought before any such decision had been made. The Divisional Court refused permission to apply for judicial review. It observed at para 25:

> "It will rarely be appropriate to consider such issues when they may depend in part on factual matters or future events since until those factual matters are established or the events occur, the courts will not be in a position to know with sufficient certainty what issues do arise in a particular case. Similarly, when matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known."

Observations to similar effect were made in the cases of ***R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*** [2021] EWHC 950 (Admin); [2022] EWCA Civ 118 and ***Keatings v Advocate General for Scotland***, where proceedings concerning the legislative competence of the Senedd and the Scottish Parliament respectively, raised in advance of the introduction of legislation, were held to be premature. The approach followed in these authorities is eminently sensible. As Lord Phillips of Worth Matravers MR observed in an earlier case, the court should not be used as a general advice centre. The danger is that it will enunciate propositions of principle without full appreciation of the implications that these will have in practice: ***R (Burke) v General Medical Council*** [2005] EWCA Civ 1003; [2006] QB 273, para 21.

53. However, these authorities were all concerned with ordinary litigation. There may be greater scope for this court to entertain issues that might not otherwise be ripe for decision in the context of references under its devolution jurisdiction. Nevertheless, we accept that counsel for the Advocate General makes some powerful points, which may often be compelling. We do not, however, find them compelling in the circumstances of the present case. As the Lord Advocate submitted, those circumstances are exceptional, for the following reasons:

(1) The reference has been made in order to obtain an authoritative ruling on a question of law which has already arisen as a matter of practical importance. It is a question on which the Lord Advocate has to advise ministers. The answer to the question will have practical consequences: it will determine whether the proposed Bill is introduced into the Scottish Parliament or not. The question is therefore not hypothetical, academic or premature.

(2) The question relates to a proposed Bill which, the court is informed by the Lord Advocate, the Scottish Government intends to introduce in the event that the court decides that it does not relate to reserved matters. All the provisions of the Bill which are material to the question referred will, the court is informed, be introduced in the same form as they are in before the court.

(3) The purpose and effect of the material provisions of the Bill are apparent without the assistance of a policy memorandum or related papers.

(4) Given the brevity and clarity of the provision in issue in this case, and the Scottish Government's commitment and practical ability to secure its enactment in its present form, the court does not have to be concerned in this case about the possibility that the Bill might be materially amended during its passage through the Scottish Parliament.

(5) In the circumstances of this case, the court can discount the risk that a further reference under section 33 is likely to be needed in order to deal with materially

different aspects of legislative competence.

(6) As we have indicated at paras 44-45 above, we do not consider that the Lord Advocate, in making the reference, is acting other than with a proper sense of her responsibilities. The question referred is not of a routine character. It is understandable that the Lord Advocate should have decided that it should be referred to this court in the public interest.

54. For these reasons, we **conclude that the court should accept the reference**.

5. Consideration of the question referred

55. In order to decide the question referred, the court will begin by considering the arguments presented by the Lord Advocate, and the response to those arguments by counsel for the Advocate General. We will then consider the arguments presented by the Scottish National Party, and the Advocate General's response.

(1) The arguments of the Lord Advocate and the Advocate General

(i) Introduction

56. The question referred was set out at para 12 above. The central issue is whether legislation providing for a referendum on Scottish independence would relate to a reserved matter. If so, it would be beyond the power of the Scottish Parliament, since section 29(2)(b) of the Scotland Act provides that a provision is outside the legislative competence of the Scottish Parliament so far as "it relates to reserved matters": para 8 above. In terms of paragraph 1 of Schedule 5, reserved matters include "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom": para 5 above.

57. The critical question is accordingly whether the proposed Bill would relate to the Union of the Kingdoms of Scotland and England or the Parliament of the United Kingdom. Section 29(3) provides, so far as material:

> "For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined … by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."

The **court has repeatedly held that the phrase "relates to" indicates something more than a loose or consequential connection:** ***Martin v Most***, para 49; ***Imperial Tobacco,*** para 16; and ***In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64; [2019] AC 1022; 2019 SC (UKSC) 13 ("***Continuity Bill***"), para 27.

(ii) The case that the proposed Bill relates to reserved matters

58. In her submissions, the Lord Advocate very fairly presented to the court the arguments on both sides of the question. Counsel for the Advocate General developed the arguments in favour of an affirmative answer, ie that the proposed Bill providing for a referendum on the question, "Should Scotland be an independent country*?*", does relate to reserved matters and so is outside the Scottish Parliament's legislative competence. The arguments advanced in favour of the conclusion that the Bill would relate to the reserved matter of the Union of the Kingdoms of Scotland and England can be summarised as follows.

59. First, counsel noted that the court had previously held that the purpose of paragraph 1 of Schedule 5 was that matters in which the United Kingdom as a whole had an interest should continue to be the responsibility of the United Kingdom Parliament: see, for example, ***Imperial Tobacco,*** para 29. That was consistent with the statement in relation to reserved matters, in the White Paper which preceded the Scotland Act, that "[t]he Government believe that reserving power in these areas will safeguard the integrity of the UK": ***Scotland's Parliament*** (Cmnd 3658, 1997), para 3.4. That pointed to measures which

questioned the integrity of the United Kingdom being reserved.

60. Secondly, counsel noted the court's previous statements to the effect that the phrase "relates to" requires more than a loose or consequential connection. A referendum on independence would, it was submitted, have more than a loose or consequential connection to the reserved matter of the Union of the Kingdoms of Scotland and England.

61. Thirdly, as to the purpose of the Bill, the court was entitled to infer from a wide variety of background materials that the objective of the Scottish Government in introducing the Bill would be to achieve independence from the United Kingdom. For example, the Bill was intended to fulfil a manifesto commitment to hold a referendum "capable of bringing about independence": Scottish National Party Election Manifesto, *Scotland's Future, Scotland's Choice* (2021), p 12.

62. Fourthly, as to the effect of the Bill, although the referendum would not be self-executing – that is to say, a majority vote in favour of independence would not automatically result in legal change to give effect to that outcome – its practical effect would be politically significant. A "yes" vote would, in the Lord Advocate's submission, support the Scottish Government's case for negotiating independence with the United Kingdom Government, and would place political pressure on the United Kingdom Government and Parliament to respect the result by agreeing to independence for Scotland. It would be difficult for the United Kingdom Parliament to ignore a decisive expression of public opinion. A "no" vote would also be politically significant in its impact. In the submission of counsel for the Advocate General, were the outcome of a referendum to favour independence, it would be used to seek to build momentum towards achieving the termination of the Union and the secession of Scotland. It was in precisely that hope that the Bill was being proposed.

63. Counsel's submissions in support of the case that the Bill would relate to the reserved matter of the Parliament of the United Kingdom proceeded on a similar basis. The purpose of a referendum on Scottish independence would relate to the United Kingdom Parliament for essentially the same reasons as it would relate to the Union. The **scope of the reservation encompassed the sovereignty of the United Kingdom Parliament. The secession of Scotland from the Union would necessarily bring that sovereignty in relation to Scotland to an end**: the United Kingdom Parliament would no longer be able to make laws for Scotland. A referendum on independence had the purpose, within the meaning of section 29(3), of bringing that end about.

(iii) The case that the proposed Bill does not relate to reserved matters

64. In support of the argument that the proposed Bill does not relate to the reserved matter of the Union, the Lord Advocate submitted, first, that although the aim of Schedule 5 was to reserve to the United Kingdom Parliament matters of concern to the entire United Kingdom, the holding of an advisory referendum did not take the question of the Union out of that Parliament's hands.

65. Secondly, it was submitted that a different approach to the meaning of the phrase "relates to", requiring a "close connection", had been adopted by Lord Mance, with whom a majority of the court agreed, in ***In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*** [2015] UKSC 3; [2015] AC 1016 ("***Welsh Asbestos***"), para 27. Furthermore, it was submitted, the court's approach to the issue in the *Continuity Bill* case at paras 25-33 suggested that there had to be a legal or direct practical effect on the reserved matter before the provision could be said to "relate to" it. Following these approaches, the connection between an advisory referendum and a reserved matter would be insufficiently close and direct.

66. Thirdly, in relation to the purpose of the Bill, the Lord Advocate submitted that the court's

approach to the purposive interpretation of statutes was narrower in scope than the approach which had been adopted to identifying the purpose of devolved legislation in the context of section 29(2). The focus, in the former context, was primarily on the language used by the United Kingdom Parliament rather than on background material. Following that approach, the purpose of the Bill, as set out in clause 1, was "to make provision for ascertaining the views of the people of Scotland". No wider purpose was identified. If the purpose was merely to ascertain the views of the people of Scotland, then that related to the Union in only a loose or consequential way. 67. Fourthly, in relation to the effect of the Bill, it was submitted that the practical effects of a referendum were speculative. The court was not equipped to engage in such speculation, and it would be constitutionally inappropriate for it to guess how the United Kingdom Parliament might respond if a referendum resulted in a decision in favour of independence. In any event, in referring to the effect of a provision in section 29(3), the United Kingdom Parliament should be taken to have meant the direct effects prescribed by the legislation.

68. Fifthly, **the Scottish Parliament must, as a matter of principle, have the power to ascertain the views of the electorate on particular issues by means of a referendum**. Since the Scottish Government can negotiate with the United Kingdom Government in relation to reserved matters, for example where a section 30 order is sought, and the Scottish Parliament can debate and pass motions in respect of reserved matters, it is appropriate that the power to hold a referendum should extend to reserved matters.

69. Essentially the same argument was advanced by the Lord Advocate in support of the proposition that the Bill would not relate to the Parliament of the United Kingdom. Since the Bill would establish only an advisory referendum, it was submitted, it would not restrict the powers, authority or jurisdiction of the United Kingdom Parliament.

(IV) THE COURT'S ASSESSMENT

70. The court has repeatedly held that the purpose of the reservation of the Union and the United Kingdom Parliament, and the other matters listed in paragraph 1 of Schedule 5, is that "matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament at Westminster": ***Imperial Tobacco,*** para 29. The point was repeated in ***Christian Institute v Lord Advocate*** [2016] UKSC 51; 2017 SC (UKSC) 29; [2016] HRLR 19 ("***Christian Institute***"), para 65. In ***Continuity Bill***, para 60, the court stated that the matters reserved by paragraph 1 of Schedule 5 are "all fundamental elements of the constitution of the UK, and of Scotland's place within it". We agree with the Lord Advocate's submission (para 59 above) that that points towards measures which question the integrity of the United Kingdom being reserved. That, however, is not determinative. It is necessary to decide whether the proposed Bill would relate to the reserved matters of the Union and the United Kingdom Parliament, in accordance with section 29 of the Scotland Act.

71. In relation to the meaning of the phrase "relates to", we are not persuaded by the Lord Advocate's argument (para 65 above) that there is any difference between the approach which this court adopted in ***Martin v Most***, para 49, ***Imperial Tobacco,*** para 16, and ***Continuity Bill***, para 27, to the effect that the phrase indicates something more than a loose or consequential connection, and the approach adopted by Lord Mance in the ***Welsh Asbestos*** case. The issue there was whether the Welsh Assembly (as it then was) had the power, under the conferred powers model then in place, to impose a charge on the insurers of persons liable to the victims of asbestos-related diseases, on the basis that the funds raised would be used to pay for health services. The argument was that the legislation imposing the charge related to "Organisation and funding of national health service". Lord Mance cited at para 25 of his judgment the relevant dicta from ***Martin v Most*** and ***Imperial Tobacco***. At para 27, he expressed

the view that any raising of charges permissible on that basis would have to be "more directly connected" with the health service provided and its funding, as would be the case, for example, in the case of prescription charges. However, **the only connection between the imposition of the charge on the insurers and the health services provided and their funding was alleged wrongdoing on the part of a person whom the insurer had insured. That**, said Lord Mance, **was** "***at best an indirect, loose or consequential connection***". The judgment **does not indicate any departure from the approach adopted in the earlier cases**, or **any intention to adopt a test of "direct connection"**. Nor has it been interpreted in any subsequent decision of this court as having done so.

72. Nor does the court consider that a different approach was adopted in the ***Continuity Bill*** case. In that case, the court expressly stated that, in order to relate to a reserved matter, a provision must have more than a loose or consequential connection with it, citing the relevant dicta in ***Martin v Most*** and ***Imperial Tobacco***: para 27. It did not suggest that a legal or direct effect on the reserved matter was necessary.

73. In relation to the "purpose" of a provision, ascertaining the purpose of legislation in the context of section 29(3) is a different exercise from the purposive interpretation of legislation. The Lord Advocate's argument (para 66 above) is accordingly based on a mistaken analogy. In the context of statutory interpretation, the court is concerned only with the objective meaning of the language used. That requires an intense focus on the words used by the legislature, although other background materials can sometimes be used as an aid to their construction. The exercise required by section 29(3) is of a different nature. The **court is not attempting to construe the legislation in question.** On the contrary, as was said in ***In re Agricultural Sector (Wales) Bill*** [2014] UKSC 43; [2014] 1 WLR 2622 ("***Agricultural Bill***"), para 50:

> "As the section requires the purpose of the provision to be examined it is necessary to look not merely at what can be discerned from an objective consideration of the effect of its terms. The clearest indication of its purpose may be found in a report that gave rise to the legislation, or in the report of an Assembly committee; or its purpose may be clear from its context."

The court also observed in that case, at para 54, that the purpose and effect of legislation may, in this context, be "derived from a consideration of both the purpose of those introducing it and the objective effect of its terms". Similar observations have been made in other cases, including ***Martin v Most,*** para 75, and ***Imperial Tobacco,*** paras 16-17. The point is well illustrated by the latter case, where the legal effect of the provisions under challenge was to inhibit trading in tobacco and smoking-related products, but their real purpose – "what these provisions are really about", as it was put at para 43 – was to promote public health.

74. In relation to the "effect" of a provision, we do not accept the Lord Advocate's submission (para 67 above) that the effect of a provision, within the meaning of section 29(3), is confined to the direct effects prescribed by the legislation. In the first place, regard is to be had to the provision's "effect in all the circumstances": a phrase whose scope extends beyond purely legal effects. That is reflected in the court's attention to the practical consequences of the provisions in question, as for example in ***Imperial Tobacco,*** para 39, and in ***Agricultural Bill,*** para 53, where the court referred to the "legal and practical effects of the Bill". Furthermore, the court has previously made it clear that a provision does not have to modify the law applicable to a reserved matter in order to relate to that matter: ***Christian Institute,*** paras 33 and 63.

75. Having clarified the meaning of the terms employed in section 29(2) and (3), it is next necessary to apply the test to the proposed Bill. In doing so, we follow the structured analysis adopted in ***Imperial Tobacco,*** para 26, and the ***Continuity Bill*** case, para 27, and ask two questions:

(1) What is the scope of the subject-matter of the relevant matter reserved by Schedule 5?

(2) By reference to the purpose of the provision under challenge, having regard (among other things) to its effect in all the circumstances, does that provision relate to the reserved matter?

76. In the present case, **two reserved matters are relevant: the Union, and the United Kingdom Parliament.** The scope of the reservation of the Union is sufficiently clear for the purposes of this case from its terms: the Union of the Kingdoms of Scotland and England. **In relation to the reservation of the United Kingdom Parliament**, this **court held** in the ***Continuity Bill*** case, para 61, **that the reservation "encompasses, amongst other matters, the sovereignty of Parliament".**

77. In this case, the purpose which is apparent on the face of the Bill is also what the Bill is really about. The **purpose of the Bill is to hold a lawful referendum on the question whether Scotland should become an independent country**. **That** question **evidently encompasses the question whether the Union between Scotland and England should be terminated, and the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom.**

78. The **effect of the Bill**, however, **will not be confined to the holding of a referendum**. Even if it is not self-executing, and can in that sense be described as advisory, a lawfully held referendum is not merely an exercise in public consultation or a survey of public opinion. It is a democratic process held in accordance with the law which results in an expression of the view of the electorate on a specific issue of public policy on a particular occasion. Its importance is reflected, in the first place, in its official and formal character. Statutory authority is needed (and would be provided by the Bill) to set the date and the question, to define the franchise, to establish the campaign period and the spending rules, to lay down the voting rules, to direct the performance of the counting officers and registration officers whose function it is to conduct the referendum, and to authorise the expenditure of the public resources required. Statutory authority, and adherence to the statutory procedure, confer legitimacy upon the result.

79. That legislative framework is put in place because the result of a lawfully held referendum is a matter of importance in the political realm, even if it has no immediate legal consequences. That has been demonstrated in practice by the history of referendums in this country, and has also been recognised by this court. For example, in relation to the 2014 referendum on Scottish independence, Lord Hodge stated in ***Moohan v Lord Advocate*** [2014] UKSC 67; 2015 SC (UKSC) 1; [2015] AC 901, para 17, with the agreement of the majority of the court, that "the referendum is a very important political decision for both Scotland and the rest of the United Kingdom". In relation to the 2016 referendum on leaving the European Union, the majority of the court stated in ***R (Miller) v Secretary of State for Exiting the European Union*** [2017] UKSC 5; [2018] AC 61, para 124:

> "[T]he referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance."

80. The Lord Advocate herself, in her written submissions to the court, describes the issue raised by the reference as "one of exceptional public importance to the people of Scotland and the United Kingdom", as of "considerable practical importance", and as "a question of fundamental constitutional and public importance". Those submissions contrast with the argument advanced elsewhere in the same document that the proposed Bill would have "limited legal and practical effect", that it "relates to the Union in only an indirect or consequential

way", and that "[a]ny practical effects beyond ascertaining the views of the people of Scotland are speculative, consequential and indirect and should not properly be taken into account". The former submissions reflect a more realistic assessment.

81. A **lawful referendum on the question envisaged by the Bill would undoubtedly be an important political event**, even if its outcome had no immediate legal consequences, and **even if the United Kingdom Government had not given any political commitment to act upon it**. A **clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate**. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would **consequently have important political consequences relating to the Union and the United Kingdom Parliament.**

82. Turning, then, to the **question whether the Bill relates to the Union** and **determining that question by reference to the purpose of the Bill**, having regard to its effect in all the circumstances, **we are in no doubt as to the answer. It is plain that a Bill which makes provision for a referendum on independence – on ending the Union – has more than a loose or consequential connection with the Union of Scotland and England**. That conclusion is fortified when regard is had to the effect of such a referendum. As we have explained at para 74 above, **it is not only legal effects that are relevant** in the context of section 29(3). **A lawfully held referendum would be a political event with political consequences**. It is equally **plain that a Bill which makes provision for a referendum on independence – on ending the sovereignty of the Parliament of the United Kingdom over Scotland - has more than a loose or consequential connection with the sovereignty of that Parliament**.

83. For these reasons, **we reject the Lord Advocate's submissions that the proposed Bill does not relate to reserved matters.**

(2) The Scottish National Party's additional arguments: self-determination and the principle of legality

84. In addition to adopting the submissions made by Lord Advocate in support of the legislative competence of the Scottish Parliament in relation to the proposed Bill, **the intervener**, the Scottish National Party, makes **further submissions founded on the right to self-determination in international law and the principle of legality in domestic law.**

85. The intervener submits **that the right to self-determination is a fundamental and inalienable right in international law and that there is a strong presumption in favour of the interpretation of domestic legislation in a manner which is compatible with international law**. While a narrow reading of the phrase "relates to" in section 29(2)(b) of the Scotland Act would render within competence a non-self-executing referendum in accordance with the right of the Scottish people to self-determination, a broad reading of that phrase would be incompatible with that right. It is submitted that where two possible readings of a statutory provision are available, one of which is compatible with international law and the other of which is not, the former should be preferred. In support of this submission the intervener relies upon article 1 of the United Nations Charter which provides that one of the fundamental purposes and principles of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". It further relies on General Assembly Resolution 1514 of December 1960 which states, at para 2:

> "**All peoples have the right to self-determination**; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

This statement is repeated in the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966).

86. The **Advocate General does not dispute that the United Kingdom recognizes and respects the right of**

self-determination in international law. However, he submits that the intervener fails to make good its implicit and necessary assertion that the right to self-determination in international law obliges the United Kingdom to make provision, either through the terms of the Scotland Act or otherwise, for a further advisory referendum on Scottish independence in the terms of the proposed Bill. In particular, the Advocate General submits that the principle of self-determination has no application here. Secondly, he submits that nothing in the Scotland Act, which is the only relevant statutory scheme on this reference, breaches the right to self-determination, regardless of the interpretation given to it on this reference.

87. The **strong presumption in favour of interpreting our domestic law in a way which does not place the United Kingdom in breach of its obligations in international law is well established**. (See, for example, ***R v Lyons*** [2002] UKHL 44; [2003] 1 AC 976 per Lord Hoffmann at para 27; ***Assange v Swedish Prosecution Authority*** [2012] UKSC 22; [2012] 2 AC 471 per Lord Dyson at para 122.) If there is ambiguity in a statutory provision operating in a field where the United Kingdom is bound by a treaty obligation, the presumption of conformity with international law will apply to the interpretation of that statutory provision (***Salomon v Commissioners of Customs and Excise*** [1967] 2 QB 116 ("***Salomon***"), per Diplock LJ at p 143). This presumption of compatibility extends to international treaty obligations whether or not they have been implemented into domestic law within the United Kingdom (***R v Secretary of State for the Home Department, Ex parte Brind*** [1991] 1 AC 696 per Lord Bridge at pp 747-748, per Lord Ackner at p 760 (concerning the European Convention on Human Rights, which at that date had not been implemented into domestic law); ***Bennion, Bailey and Norbury on Statutory Interpretation***, 8th ed (2020), section 26.9; Shaheed Fatima, "The Domestic Application of International Law in British Courts", in Curtis Bradley, ed, ***The Oxford Handbook of Comparative Foreign Relations Law*** **(2019)** at pp 494-495; James Crawford, ***Brownlie's Principles of Public International Law***, 9th ed (2019), p 62, citing Diplock LJ in ***Salomon*** at p 143). However, the presumption will only be a permissible aid to interpretation if the statutory provision is not clear on its face (***Salomon*** per Diplock LJ at p 143; ***JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*** [1990] 2 AC 418, per Lord Templeman at p 481; ***R (SG) v Secretary of State for Work and Pensions*** [2015] UKSC 16; [2015] 1 WLR 1449, per Lord Hughes at para 137, per Lord Kerr at para 239).

88. There are **insuperable obstacles in the path of the intervener's argument based on self-determination. First, the principle of self-determination is simply not in play here**. The scope of the principle was considered by the Supreme Court of Canada in the ***Reference re Secession of Quebec*** [1998] 2 SCR 217. There, the Governor in Council referred a series of questions to the Supreme Court including whether there exists a right to self-determination under international law that would give Quebec the right to secede unilaterally. In its judgment the Supreme Court explained (at paras 136-137) that Canada was a sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction. It considered that the then current constitutional arrangements within Canada did not place Quebecers in a disadvantaged position within the scope of the international law rule. It continued:

> "In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the **people in question**

> **are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination**. **Such exceptional circumstances** are **manifestly inapplicable to Quebec under existing conditions**." (at para 138)

It went on to say that **in other circumstances peoples were expected to achieve self-determination within the framework of their existing state:**

> "A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. **Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development**. In the circumstances, **the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally**."
>
> (at para 154).

89. In our view **these observations apply with equal force to the position of Scotland and the people of Scotland within the United Kingdom.** They are also consistent with the United Kingdom's submission to the International Court of Justice in the case of Kosovo, adopted by the intervener as part of its submissions in the present case: "To summarise, **international law favours the territorial integrity of "States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede'**": Written Proceedings in relation to UN General Assembly Resolution 63/3 (A/RES/63/3) (8 October 2008), Written Statement of the United Kingdom in response to the Request for an Advisory Opinion of the International Court of Justice on the Question, 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?", (17 April 2009), para 5.33. The submission went on to state that **international law does not, in general, prohibit secession**; but the **relevant point, in relation to the intervener's submission based on a *right* of self-determination under international law, is the absence of recognition of any such right outside the contexts described by the Supreme Court of Canada**, none of which applies to Scotland.

90. Secondly, the **intervener relies on the principle of self-determination in international law as an interpretative tool supporting a narrow reading of the words "relates to"** in section 29(2)(b) **so as to give a more limited scope to the limitation of legislative competence relating to reserved matters**. However, **no reading of that subsection**, whether wide or narrow, **could result in a breach of the principle of self-determination in international law**. The **Scotland Act allocates powers between the United Kingdom and Scotland as part of a constitutional settlement.** It establishes **a carefully calibrated scheme of devolution powers**. **Nothing in the allocation of powers, however widely or narrowly interpreted, infringes any principle of self-determination.** On the contrary, **the legislation establishes a system of devolution founded on principles of subsidiarity**. It is **now well established that devolution legislation such as the Scotland Act falls to be interpreted like any other statute, subject to the rules of interpretation set by the Act itself** (see, for example, section 29(3) and (4)). It would be **inappropriate to apply any interpretative presumption with the purpose of achieving a greater or lesser devolution of powers.**

91. For the same reasons, the principle of legality does not avail the intervener. Nothing in the allocation of powers under the Scotland Act infringes the principle of legality.

6. CONCLUSION

92. We therefore answer the reference as follows:

(1) The **provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum** would be "***Should Scotland be an independent country?***" **relates to reserved matters**.

(2) **In particular, it relates to (i) the Union of the Kingdoms of Scotland and England and (ii) the Parliament of the United Kingdom.**

* * * * *

(Carried from p. 34→)

first of our Preambular promises. Rawls in his 'A Theory of Justice' writes: "…Justice is the first virtue of social institutions, as truth is of system of thoughts…" "…Therefore **in a just society the liberties of equal citizenship are taken as settled**, the **rights secured by justice are not subject to political bargaining or to the calculus of social interest**…"[46]

83. By **asking the girls to take off their hijab before they enter the school gates, is first an invasion on their privacy, then it is an attack on their dignity**, and then **ultimately it is a denial to them of secular education**. These are **clearly violative of Article 19(1)(a), Article 21 and Article 25(1)** of the Constitution of India.

84. Consequently, I **allow all the appeals as well as the Writ Petitions**, but **only to the extent as ordered below:**

a) The order of the Karnataka High Court dated March 15, 2022, is hereby set aside;

b) The G.O. dated February 5, 2022 is hereby quashed and,

c) There shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka.

SUDHANSHU DHULIA, J.
New Delhi,
October 13, 2022.

* * * * *

O R D E R

In view of the divergent views expressed by the Bench, the matter be placed before Hon'ble The Chief Justice of India for constitution of an appropriate Bench.

HEMANT GUPTA, J.,

SUDHANSHU DHULIA, J.

New Delhi,

October 13, 2022.

* * * * *

[46] Rawls, John (1921): ***A Theory of Social Justice***, Rev. Ed.; The Belknap Press of the Harvard University Press, Cambridge, Massachusetts.

SUPREME COURT OF INDIA AT NEW DELHI

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 1974 OF 2022♦
[arising out of SLP (Crl.) No. 7536/2022]

Date of Judgment: Thursday, 13 October 2022

R.P. RAVICHANDRAN … Appellant(s)
Versus
State of Tamil Nadu, rep. by its Chief Secretary and others. - Respondents.

With CRIMINAL APPEAL No. 1975 of 2022
[Arising out of SLP(CRL.) No. 8178 of 2022]

CORAM:

B.R. GAVAI, J.

B.V. NAGARATHNA, J.

* * *

O R D E R

1. Leave granted.

2. For the reasons stated, applications for impleadment are allowed.

3. The **appellants/applicants have been convicted for offences** under the Indian Penal Code, 1860, the Arms Act, 1951, the Explosive Substances Act, 1908, the Passport Act, 1967, the Foreigners Act, 1946, the Indian Wireless Telegraphy Act, 1933 and the Terrorist and Disruptive Activities (Prevention) Act, 1987 **for the assassination of Shri Rajiv Gandhi, the Former Prime Minister of India and others**, on 21.05.1991. **This Court, vide judgment dated 11.05.1999, upheld the conviction and sentence imposed on the appellants/applicants.**

4. In so far as the six appellants/applicants before us are concerned, out of the six, the death sentence was confirmed in the case of accused S. Nalini, Suthendraraja @ Santhan and Sriharan @ Murugan, which was subsequently converted to

♦ The Hon'ble Supreme Court, by this decision, has set at liberty all other life convicts in the Rajiv Gandhi assassination case who had already undergone more than 30 years incarceration by now on similar rationale as for the release of Perarivalan earlier on 18 May 2022. - Ed.

life imprisonment on account of inordinate delay in deciding their mercy petition, vide judgment and order dated 18.02.2014.

5. In so for as the rest of the appellants/applicants are concerned, they have been convicted and sentenced to life imprisonment.

6. The Cabinet of the State of Tamil Nadu had passed a Resolution on 09.09.2018 recommending the release of all the appellants/applicants, including the original convict A.G. Perarivalan. There were **certain other developments after the State Cabinet had passed a resolution**. Consequently, the matter reached up to this Court by way of Criminal Appeal Nos. 833834 of 2022. The **issue that fell for consideration before this Court was, as to whether the Hon'ble Governor was bound by the decision of the State Cabinet or, as to whether, he could refer the matter to the Union of India for its opinion.**

7. The **issue was finally concluded by the judgment of this Court dated 18.05.2022**, in the case of ***A.G. Perarivalan vs. The State of Tamil Nadu*** (Criminal Appeal Nos. 833-834 of 2022). This Court held thus:

> "29. In conclusion, we have summarized our findings below:
>
> (a) The **law laid down** by a catena of judgments of this Court **is well-settled that the advice of the State Cabinet is binding on the Governor in the exercise of his powers under Article 161** of the Constitution.
>
> (b) **Non-exercise of the power under Article 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to judicial review by this Court**, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Governor to this effect.
>
> (c) The **reference of the recommendation of the Tamil Nadu Cabinet by the Governor to the President of India two and a half years after such recommendation** had been made is **without any constitutional backing and is inimical to the scheme of our Constitution**, whereby "the **Governor is but a shorthand expression for the State Government**" as observed by this Court.
>
> (d) The judgment of this Court in ***M.P. Special Police Establishment*** (supra) **has no applicability to the facts of this case** and neither has any attempt been made to make out a case of apparent bias of the State Cabinet or the State Cabinet having based its decision on irrelevant considerations, which formed the fulcrum of the said judgment.
>
> (e) The understanding sought to be attributed to the judgment of this Court in ***Sriharan*** (Supra) with respect to the Union Government having the power to remit/commute sentences imposed under Section 302, IPC is incorrect, as no express executive power has been conferred on the Centre either under the Constitution or law made by the Parliament in relation to Section 302. In the absence of such specific conferment, it is the executive power of the State that extends with respect to Section 302, assuming that the subject-matter of Section 302 is covered by Entry 1 of List III.
>
> (f) Taking into account the Appellant's prolonged period of incarceration, his satisfactory conduct in jail as well as during parole, chronic ailments for his medical records, his educational qualifications acquired during incarceration and the pendency of his petition under Article 161 for two and half years after the recommendation of the State Cabinet, we **do not consider it fit to remand the matter for the Governor's consideration. In exercise of our power under Article 142 of the Constitution, we direct that the Appellant is deemed to have served the sentence** in connection with Crime No. 329 of 1991. **The Appellant, who is already on bail, is set at liberty forthwith. His bail bonds are cancelled**."

8. Thus, it could be seen that the Court **held that the Hon'ble Governor, in the matter of remission of an appellant convicted under Section 302, was bound by the advice of the State Cabinet.** Indisputably, in the present case also, the State Cabinet had resolved to grant remission to all the appellants/applicants.

9. In the case cited Supra, this Court took into consideration various factors, which, according to this Court, were sufficient to direct that the appellant therein be deemed to have served the sentence awarded in connection with Crime No. 329 of 1991. The appellant therein, who was already on bail, was directed to be set at liberty forthwith. His bail bonds were also cancelled.

10. We propose to examine the case of each of the appellants/applicants herein in the light of the observations made by this Court in the case of ***A.G. Perarivalan*** (supra).

11. In the case of **Appellant/applicant Robert Payas**, it is seen that **his conduct has been found to be satisfactory**. He has also been suffering from various ailments. During the period of incarceration, he has undertaken studies and obtained various degrees and diplomas, including the postgraduate degree in Arts (History).

12. In the case of **appellant/applicant Jeyakumar** also, **his conduct has been found to be satisfactory**. He has also undertaken various studies, including diplomas in catering, four-wheeler mechanism, etc.

13. In the case of **appellant/applicant Suthendraraja @ Santhan**, he has **also been suffering from various ailments**. During the period of incarceration, he has written many articles and poems which have not only been published but have received various prizes and awards, including in France and Germany.

14. In the case of **appellant/applicant R.P. Ravichandran, his conduct has also been found to be satisfactory and he too has undertaken various studies during the period of incarceration**, including the post-graduate degree in Arts. He has also donated various amounts for charitable purposes.

15. In the case of **appellant/applicant S. Nalini**, she is **a woman and has been incarcerated for a period of more than three decades and her conduct has also been found to be satisfactory**. She has also undertaken various studies during the period of incarceration, including a postgraduate diploma in Computer Applications.

16. In the case of **appellant/applicant Sriharan @ Murugan, his conduct has also been found to be satisfactory**. He has also **undertaken various studies**, including Master of Computer Applications.

17. It is thus **clear that the factors which weighed with this Court while directing that A.G. Perarivalan be deemed to have served the sentence** in connection with Crime No. 329 of 1991 **are equally applicable to all the present appellants/applicants**. All the present appellants/ applicants have been incarcerated for the same period for which A.G. Perarivalan was incarcerated. The conduct of the present appellants/applicants has been found to be satisfactory. Most of them are suffering from various ailments. All of them have undertaken various studies during the period of incarceration.

18. We, therefore, **direct that all the appellants/ applicants be deemed to have served their respective sentences** in connection with Crime No. 329 of 1991. The **appellants/applicants are**, therefore, **directed to be set at liberty forthwith**, if not required in any other case.

19. The appeals are disposed of in the above terms.

20. Pending application(s), if any, stand(s) disposed of.

B.R. GAVAI, J

B.V. NAGARATHNA, J.

New Delhi

11 November 2022

* * * * *

ITEM NO. 38 COURT NO. 9 SECTION II-C

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS
Petition(s) for Special Leave to Appeal (Crl.) No(s). 7536/2022

(Arising out of impugned final judgment and order dated 17-06-2022 in WPMD No. 16658/2020 passed by the High Court Of Judicature At Madras)

R.P. RAVICHANDRAN ... Petitioner(s)

VERSUS

The State of Tamil Nadu rep. by its CHIEF SECRETARY & Ors. ... Respondent(s)

(IA No. 114833/2022-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.114834/2022-EXEMPTION FROM FILING O.T. AND APPLICATIONS FOR IMPLEADMENT)

WITH SLP (Crl.) No. 8178/2022 (II-C)

(FOR ADMISSION and I.R. and IA No. 127602/ 2022 - EXEMPTION FROM FILING O.T. and IA No. 127601/ 2022 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Date: 11-11-2022

This petition was called on for hearing today.

CORAM:
HON'BLE Mr. JUSTICE B.R. GAVAI
HON'BLE Mrs. JUSTICE B.V. NAGARATHNA

For parties:
Mr. Sanjay Hedge, Sr. Adv.
Mr. G. Ananda Selvam, Adv.
Mr. Thiru Murugan, Adv.
Mr. S. Muthu Krishnan, Adv.
Mr. P. Soma Sundaram, AOR
Mr. Arunagiri, Adv.
Mr. Kishor Hussain, Adv.
Mr. G. Ananda Selvam, Adv.
Mr. G Muthu, Adv.
Mr. Sanchit Maheshwari, Adv.
Mr. Mayilsamy. K, Adv.
Mr. Raghav Gupta, Adv.
Mr. Shahrukh Ali, Adv.
Mr. Mahabir Singh, Adv.
Mr. Anand Dilip Landge, AOR
Mr. Rakesh Dwivedi, Senior Adv.
Mr. V. Krishnamurthy, Sr. Adv./AAG.
Mr. Amit Anand Tiwari, AAG
Dr. Joseph Aristotle S., AOR.
Ms. Shakeena A.G., Adv.
Mr. Eklavya Dwivedi, Adv.
Ms. Monika Dwivedi, Adv.
Ms. Devyani Gupta, Adv.
Ms. Tanvi Anand, Adv.
Ms. Nupur Sharma, Adv.
Mr. Shobhit Dwivedi, Adv.
Ms. Vaidehi Rastogi, Adv.
Mr. Rakesh Dwivedi, Sr. Adv.
Mr. V. Krishnamuthy, Ar. Adv/AAG
Mr. Amit Anand Tiwari, AAG
Dr. Joseph Aristotle S., AOR
Ms. Shakeena A.G., Adv.
Ms. Monika Dwivedi, Adv.
Ms. Devyani Gupta, Adv.
Ms. Tanvi Anand, Adv.
Ms. Nupur Sharma, Adv.
Mr. Sobit Dwivedi, Adv.
Mr. Sanjeev Kr. Mahana, Adv.
Ms. Vaidehi Rastogi, Adv.
Ms. Riha Vishwakarma
Mr. Gopal Sankaranarayanan, Sr. Adv.
Mr. N. Chandrasekaran, Adv.
Mr. Prabu Ramasubramanian, Adv.
Ms. Shivani Vij, Adv.
Mr. Alagu Raja Bharathi. B, Adv.
Mr. Bharathimohan. M, Adv.
Ms. Priya R, Adv.
Mr. S. Sabari Bala Pandian, Adv.
Mr. Avinash Kumar, Adv.
Mr. T. Harish Kumar, AOR

UPON hearing the counsel, the Court made the following

O R D E R

Leave granted. // The appeals are disposed of in terms of the signed order and the operative part of the order reads as under:

> "We, therefore, direct that all the appellants/ applicants be deemed to have served their respective sentences in connection with Crime No. 329 of 1991. The appellants/applicants are, therefore, directed to be set at liberty forthwith, if not required in any other case."

Pending application(s), if any, stand(s) disposed of.

(DEEPAK SINGH) COURT MASTER (SH)

(ANJU KAPOOR) COURT MASTER (NSH)

[Signed order is placed on the file]

* * * * *

(2022) 2 LAW ISC-301

SUPREME COURT OF INDIA AT NEW DELHI

ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) No. 55 OF 2019

[arising out of SLP (Civil) No. 5236/2022]

Date of Judgment: Monday, 7 November 2022

JANHIT ABHIYAN … PETITIONER (S)

Versus

UNION OF INDIA … RESPONDENT(S)

CORAM:

UDAY UMESH LALIT, CJI.

DINESH MAHESHWARI, J.

S. RAVINDRA BHAT, J.

BELA M. TRIVEDI, J.

J.B. PARDIWALA, J.

WITH T.C.(C) No. 8/2021, W.P.(C) No. 596/2019, W.P. (C) No. 446/2019, W.P. (C) No. 427/2019, W.P. (C) No. 331/2019, W.P. (C) No. 343/2019, W.P. (C) No. 798/ 2019, W.P. (C) No. 732/2019, W.P. (C) No. 854/2019, T.C. (C) No. 12/2021, T.C. (C) No. 10/2021, T.C. (C) No. 9/2021, W.P. (C) No. 73/2019, W.P. (C) No. 72/2019, W.P. (C) No. 76/2019, W.P. (C) No. 80/2019, W.P. (C) No. 222/2019, W.P. (C) NO. 249/2019, W.P. (C) No. 341/ 2019, T.P. (C) No. 1245/2019, T.P. (C) No. 2715/2019, T.P. (C) No. 122/2020, SLP (C) No. 8699/2020, T.C. (C) No. 7/2021, T.C. (C) No. 11/2021, W.P. (C) No. 69/2019, W.P. (C) No. 122/2019, W.P. (C) No. 106/2019, W.P. (C) No. 95/2019, W.P. (C) No. 133/2019, W.P. (C) No. 178/2019, W.P. (C) No. 182/2019, W.P.(C) No. 146/2019, W.P. (C) No. 168/2019, W.P. (C) No. 212/2019, W.P. (C) No. 162/ 2019, W.P. (C) No. 419/2019, W.P. (C) No. 473/2020, W.P. (C) No. 493/2019.

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SHORT NOTES: This is a very important decision by a Constitutional Bench of the Honourable Supreme Court of India, which has, by majority (3:2 ratio), validated the Constitutional Amendment for 10% reservation to the newly created Economically Weaker Sections category which specifically excludes the already reservations-benefited SC, ST and OBC sections from its ambit and scope. As stated in the Order published below, three Judges – Sri Dinesh Maheshwari, J., Ms. Bela M. Trivedi, J. and Mr. J.B. Pardiwala, J. – have struck down the challenge raised to the 103rd Amendment to the Constitution which provides for this additional 10% reservations to the newly created Economically Weaker Sections category and validated such scheme. It may be noted that even the dissenting Judges, Sri S. Ravindra Bhat and Hon'ble CJI, had not opposed the creation of the new category on the basis of economic backwardness, but were only critical of the exclusion of the Scheduled Castes, Scheduled Tribes, OBC sections from the scheme as they considered them to be at direr poverty levels than those from the forward castes/classes and, but for this exclusion, they would have also supported such new category creation with provision for additional 10% reservations to it. Herein we give the lead judgment of the majority decision by Sri Dinesh Maheshwari, J. in full; however, due to space constraints, we are unable to give the other decisions in full but publish some extracts/operative portions of those only.

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O R D E R

These matters have been disposed of today by pronouncement of four separate judgments rendered by Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Mr. Justice S. Ravindra Bhat, for himself and on behalf of the Hon'ble the Chief Justice; Hon'ble Ms. Justice Bela M. Trivedi; and, Hon'ble Mr. Justice J.B. Pardiwala.

In view of the decision rendered by the majority consisting of Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Ms. Justice Bela M. Trivedi and Hon'ble Mr. Justice J.B. Pardiwala, the challenge raised to 103rd Amendment to the Constitution fails and the decision rendered by Hon'ble Mr. Justice S. Ravindra Bhat remains in minority. Consequently, the Writ Petitions and other proceedings stand disposed of.

UDAY UMESH LALIT, CJI.

DINESH MAHESHWARI, J.

S. RAVINDRA BHAT, J.

BELA M. TRIVEDI, J.

J.B. PARDIWALA, J.

NEW DELHI
7 November 2022.

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(2022) 2 LAW ISC-301 contd...

SUPREME COURT OF INDIA AT NEW DELHI

ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) No. 55 OF 2019

[arising out of SLP (Civil) No. 5236/2022]

Date of Judgment: Thursday, 13 October 2022

JANHIT ABHIYAN … PETITIONER (S)

Versus

UNION OF INDIA … RESPONDENT(S)

CORAM:

UDAY UMESH LALIT, CJI.
DINESH MAHESHWARI, J.
S. RAVINDRA BHAT, J.
BELA M. TRIVEDI, J.
J.B. PARDIWALA, J.

WITH T.C.(C) No. 8/2021, W.P.(C) No. 596/2019, W.P.(C) No. 446/2019, W.P.(C) No. 427/2019, W.P. (C) No. 331/2019, W.P.(C) No. 343/2019, W.P.(C) No. 798/ 2019, W.P. (C) No. 732/2019, W.P. (C) No. 854/2019, T.C. (C) No. 12/2021, T.C.(C) No. 10/2021, T.C. (C) No. 9/2021, W.P.(C) No. 73/2019, W.P. (C) No. 72/2019, W.P. (C) No. 76/2019, W.P.(C) No. 80/2019, W.P. (C) No. 222/2019, W.P. (C) NO. 249/2019, W.P.(C) No. 341/2019, T.P.(C) No. 1245/2019, T.P. (C) No. 2715/ 2019, T.P.(C) No. 122/2020, SLP(C) No. 8699/2020, T.C.(C) No. 7/2021, T.C.(C) No. 11/2021, WP (C) No. 69/ 2019, WP (C) No. 122/2019, WP (C) No. 106/2019, WP (C) No. 95/2019, WP (C) No. 133/2019, WP (C) No. 178/ 2019, WP (C) No. 182/2019, WP (C) No. 146/ 2019, WP (C) No. 168/2019, WP (C) No. 212/2019, WP (C) No. 162/ 2019, WP (C) No. 419/2019, WP (C) No. 473/2020, WP (C) No. 493/2019

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JUDGMENT

DINESH MAHESHWARI, J.

CONTENTS

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PRELIMINARY AND BRIEF OUTLINE

1. In this batch of transferred cases, transfer petitions, writ petitions and the petition for special leave to appeal, the challenge is to the Constitution (One Hundred and Third Amendment) Act, 2019[1], which came into effect on 14.01.2019, whereby the parliament has amended Articles 15 and 16 of the Constitution of India by adding two new clauses viz., clause (6) to Article 15 with *Explanation* and clause (6) to Article 16; and thereby, the State has been empowered, *inter alia*, to provide for a maximum of ten per cent reservation for "the economically weaker sections"[2] of citizens other than "the Scheduled Castes"[3], "the Scheduled Tribes"[4] and the non-creamy layer of "the Other Backward Classes"[5]. At the outset, it needs to be stated that

[1] Hereinafter also referred to as 'the amendment in question' or 'the 103rd Constitution Amendment' or simply 'the 103rd Amendment'.

[2] 'EWS', for short.

[3] 'SC', for short.

[4] 'ST', for short.

[5] 'OBC', for short.

the amendment in question *does not mandate but enables reservation* for EWS and prescribes a ceiling limit of ten per cent.

2. In a very brief outline of the forthcoming discussion, it could be noticed that the challenge to the amendment in question is premised essentially on **three-fold grounds**: first, **that making of special provisions including reservation in education and employment on the basis of economic criteria is entirely impermissible and offends the basic structure of the Constitution**; second, that in any case, exclusion of socially and educationally backward classes[6] i.e., SCs, STs and non-creamy layer OBCs from the benefit of these special provisions for EWS is inexplicably discriminatory and destroys the basic structure of the Constitution; and third, that providing for ten per cent. Additional reservation directly breaches the fifty per cent ceiling of reservations already settled by the decisions of this Court and hence, results in unacceptable abrogation of the Equality Code which, again, destroys the basic structure of the Constitution. *Per contra*, it is maintained on behalf of the sides opposing this challenge that the amendment in question, empowering the State to make special provisions for the economically weaker sections of citizens, is squarely within the four corners of the Constitution of India; rather making of such provisions is necessary to achieve the Preambular goal of '*JUSTICE, social, economic and political*' in real sense of terms. It is also asserted that there is no discrimination in relation to the classes that are excluded from EWS for the simple reason that the existing special provisions of affirmative action in their relation continue to remain in operation. As regards the breach of fifty per cent ceiling of reservations, the contention is that the said ceiling is not inflexible or inviolable and in the context of the object sought to be achieved, ten per cent has been provided as the maximum by way of the enabling provision.

[6] 'SEBC', for short.

3. With the foregoing outline, we may usefully take note of the reference made to the Constitution Bench for determination of the substantial questions of interpretation of the Constitution, as are involved in these matters and the questions formulated while commencing the hearing.

The Referral and the Questions Formulated

4. By an order dated 05.08.2020, a 3-Judge Bench of this Court took note of the issues arising in these matters and referred the same for determination by a Constitution Bench while observing, *inter alia*, as under:

> "...By virtue of the impugned amendments, very Constitution is amended by inserting new clauses in Articles 15 and 16 thereof, which empower the State to make reservations by way of affirmative action to the extent of 10% to economically weaker sections. It is the case of the petitioners, that the very amendments run contrary to the constitutional scheme, and no segment of available seats/posts can be reserved, only on the basis of economic criterion. As such, we are of the view that such questions do constitute substantial questions of law to be considered by a Bench of five Judges. It is clear from the language of Article 145(3) of the Constitution and Order XXXVIII Rule 1(1) of the Supreme Court Rules, 2013, the matters which involve substantial questions of law as to interpretation of constitutional provisions they are required to be heard [by] a Bench of five Judges. Whether the impugned Amendment Act violates basic structure of the Constitution, by applying the tests of 'width' and 'identity' with reference to equality provisions of the Constitution, is a matter which constitutes substantial question of law within the meaning of the provisions as referred above. Further, on the plea of ceiling of 50% for affirmative action, it is the case of the respondent-Union of India that though ordinarily 50% is the rule but same will not prevent to amend the Constitution itself in view of the existing special circumstances to uplift the members of the society belonging to economically weaker sections. Even such questions also constitute as substantial questions

of law to be examined by a Bench of five Judges…."

5. Pursuant to the order aforesaid, this batch of matters has been referred to this Constitution Bench for determination of the issues arising from the challenge to the 103rd Amendment. On 08.09.2022, after perusing the issues suggested by learned counsel for the respective parties, this Court noted, amongst others, the issues suggested by the learned Attorney General for India as follows:

"(1) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria?

(2) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions?

(3) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/ STs from the scope of EWS reservation?

(4) Whether the cap of 50% referred to in earlier decisions of the Supreme Court can be considered to be a part of the basic structure of the Constitution? if so, can the 103rd Constitution Amendment be said to breach the basic structure of the Constitution?"

5.1. Having taken note of the relevant facets of the matter, this Court found that the first three issues suggested by the learned Attorney General were the main issues arising in the matter while the other issues were essentially in the nature of supplementing and substantiating the propositions emerging from the said three issues. Accordingly, this Court proceeded with the hearing with respect to the first three issues aforesaid, while leaving it open to the learned counsel appearing for the respective parties to advance their submissions touching upon other facets in aid of the said three issues.

6. We have heard learned counsel for the petitioners, the respondents, and the interveners at substantial length and have also permitted them to submit written notes on their respective submissions. The principal and material submissions advanced in these matters could be usefully summarized, while avoiding unnecessary repetition of the same line of arguments.

RIVAL SUBMISSIONS

In challenge to the amendment in question

7. Prof. (Dr.) G. Mohan Gopal led the arguments on the side of the petitioners challenging the amendment in question and also wrapped up the submissions in rejoinder.

7.1. The learned counsel has, while extensively relying on the Constituent Assembly Debates, Preamble, and Article 38 of the Constitution which enjoins the State to secure and protect "*a social order in which justice, social, economic and political shall inform the institutions of the national life*", stressed that it was to ensure this social justice and the ethos of the Constitution that special provisions were envisioned under Article 15(4) and reservations in employment were provided under Article 16(4). He argued that it was due to certain primordial practices that a section of population was marginalised and was deprived of material resources and educational opportunities. The people in the lowest strand of social hierarchy were ostracised and stigmatised from public life and were deprived of basic liberties and equality. It was to address these historical inequalities that, as a vehicle of positive discrimination, the socially oppressed sections were provided reservations and special provisions so as to give them a voice in administration, access to resources such as education and public employment. Therefore, the **idea of ensuring social equality and justice was a congenital feature of the Constitution shaping its basic structure**.

7.2. The learned counsel has argued **that this basic structure has been violated by the amendment in question which seeks to empower the privileged sections**

of society, who are neither socially and educationally backward nor inadequately represented. He also submitted that the amendment in question has introduced those section of people as economically weaker who were never subjected to any discrimination, whether historically or otherwise; and were not backward, socially and educationally. The learned counsel quoted Dr. B.R. Ambedkar, Mr. V.I. Muniswamy Pillai and Mr. Sardar Nagappa, from the Constituent Assembly Debates, to support his contention that reservation should not be used by the forward class as a self-perpetuating mechanism depriving the disadvantaged. The equation of the victims of social discrimination with those responsible for their victimisation, for the purpose of conferring benefits, was **a contortion of the Constitution and no less than playing a fraud on it**. He relied on decisions of this Court in ***T. Devadasan v. Union of India and Anr.*****: (1964) 4 SCR 680**, ***State of Kerala and Anr. v. N.M. Thomas and Ors.*****: (1976) 2 SCC 310**[7] and ***Indra Sawhney and Ors. v. Union of India and Ors.*****: 1992 Supp (3) SCC 217**[8] to submit that this Court has discerned reservations and special provisions as an effective affirmative action to mitigate inequalities and ensure social justice and equality of opportunity. The learned counsel has further relied on the decision of this Court in ***M.R. Balaji and Ors. v. State of Mysore and Ors.*****: 1963 Supp (1) SCR 439**[9], which held **that latent or covert transgression of the Constitution by abusing an ostensible power granted by it will amount to 'fraud on the Constitution'**.

7.3. The learned counsel has further submitted that the non obstante clause in Articles 15(6) and 16(6), while granting reservation to already privileged and adequately represented class of citizens, has vetoed the pre-requisite of being socially and educationally backward or inadequately represented, which was the kernel to philosophy of reservation. The Constitution puts forth social '*and*' educational backwardness and not social '*or*' educational backwardness as a criterion to determine positive discrimination in favour of a class. This foundation of social justice for historically marginalised and disadvantaged people is completely obliterated by the amendment in question, which removes that criterion. He argued that backward class included those classes from the forward class that were socially and educationally backward, hence making them eligible for benefits of reservation. He exemplified this by stating that there were numerous communities, traditionally belonging to the so-called 'forward' class, in several States and several of those are not professing any religion, but are recognized as OBC on the ground that they are socially and educationally backward.

7.4. On the point of exclusion of SCs, STs and OBCs, the learned counsel has argued that the concept of Fraternity, as envisaged in the Constitution, informs Articles 15 and 17, giving shape to equality while prohibiting discrimination and discriminatory practices prevalent in our society. **Inclusion of forward class and exclusion of disadvantaged class from the protection and benefit of reservation violate the basic structure of the Constitution**. Learned counsel has relied on the decision of this Court in ***Prathvi Raj Chauhan v. Union of India and Ors.*****: (2020) 4 SCC 727** to highlight the place and role of Fraternity in the scheme of polity and society. Further he has stated that such exclusion of SCs, STs and OBCs was primarily based on caste because it is indeed undisputed that a large chunk of population so excluded are also economically backward along with being socially and educationally backward. Hence, he would submit that the basic principle of equality forming the basic structure of the Constitution stands abrogated by excluding those who are socially and educationally backward and also are part of systemic poverty/labour under abject poverty.

7.5. The learned counsel has yet further argued **that the purpose of positive discrimination was to put an end to monopoly of certain classes and create an inclusive society so as to ensure equality of opportunity to the marginalized sections**. However, the

[7] Hereinafter also referred to as '***N.M. Thomas***'.

[8] Hereinafter also referred to as '***Indra Sawhney***'.

[9] Hereinafter also referred to as '***M.R. Balaji***'.

amendment in question creates a perpetual monopoly by providing reservation to that section of population whose identification is imprecise and is based on their individual traits more so, when these classes have been enjoying and are still enjoying control over resources and public employment.

7.6. Lastly, the learned counsel would submit **that the amendment in question is not based on economic condition, which is multi-dimensional, but on financial incapacity which is transient in nature**, rewarding poor financial behaviours and is, therefore, not a reliable criterion for giving reservation. There are two wings of reservation - social and educational backwardness, which cover the people who are economically weaker but not those who are financially incapable. Economic weakness goes hand-in-hand with social and educational backwardness. **EWS is individual-centric in contrast to Article 38(2) of the Constitution, which talks about inter-group inequalities**. Thus, the learned counsel has submitted **that the 103rd Amendment deserves to be set aside, being violative of the principle of equality, which is the basic structure of the Constitution.**

8. The learned senior counsel, Ms. Meenakshi Arora, elucidating on the twin objectives of Equality Code enshrined under Articles 14 to 17 of the Constitution as to the formal equality and substantive equality, has submitted that these provisions are to ensure that those sections of society who have been kept out of any meaningful opportunity, participation in public life and decision making, on the grounds enumerated under Article 15(1), be uplifted through positive discrimination, giving flesh and blood to the Equality Code, and essentially enabling the substantive equality. Emphasizing on the efficiency in services as under Article 335, she would submit that the positive discrimination has to be read along with other guardrails provided by the Constitution, ensuring identification of the protected group by constitutionally sanctioned bodies. The absence of these guardrails and safeguards in the newly created class of EWS through the amendment in question strikes at the core of the Equality Code, violating the basic structure of Constitution.

8.1. Stressing further on the argument of social and educational backwardness and inadequacy in representation being the bedrock for grant of reservations, the learned counsel has submitted that the communities, whom the amendment in question aims to protect, are duly represented in all walks of life and hence, even from the angle of adequacy in representation, they are not eligible to avail benefit of reservation under Articles 15 and 16. She has placed reliance on decisions of this Court in ***M.R. Balaji*** and ***Indra Sawhney*** to submit **that it is social '*and*' educational backwardness and not social '*or*' educational backwardness that is to be considered by the legislature to grant the benefit of reservation**. Furthermore, she has submitted that backwardness is *sine qua non* and the lynchpin for special provision or reservation; and as stated by Dr. B.R. Ambedkar, backwardness was designed as a qualifying phrase to ensure that the '*exception does not eat the rule*'.

8.2. Moving on and while relying on the decisions of this Court in ***Indra Sawhney***, ***N.M. Thomas***, ***M.R. Balaji*** and ***B.K. Pavitra and Ors. v. Union of India and Ors.*****: (2019) 16 SCC 129**, the learned counsel has submitted that the purpose of reservation was to enable the backward classes to have a level playing field with the forward class so that they can participate in public life with them on an equal basis. Also, this Court has held that no one criterion such as caste could be the sole basis for grant of reservation. In the amendment in question, the economic criteria is the sole basis for grant of reservation without considering the concept of representation; and this prescription is not only against the judicial pronouncements but also against the Preambular vision of casteless society, hitting the basic structure of the Constitution.

8.3. The learned counsel has further contended that for classes that are socially and educationally backward, there are constitutionally devised commissions and guardrails to ensure that the

benefits are extended only to the deserving sections, who are actually socially and educationally backward but the amendment in question is bereft of any such guardrails or safeguards. The amendment is limited to those classes that are neither identifiable nor have any constitutionally devised mechanism for their identification.

8.4. The learned counsel would further submit that economic status is transient in nature and would keep on changing unlike the status of backwardness, which is based on age-old caste practices and oppressions that are immutable. The newly protected class under the amendment in question lacks historic and continuing lack of adequate representation caused by structural or institutional barriers, so as to be eligible for positive discrimination. Further, the reservation is intended to be operative only until there is inadequacy in representation of those classes and not in perpetuity. However, the present amendment prescribes essentially no end to reservation as there would always be people poorer than others. **Since the need for reservation has been delinked from inadequacy of representation and the need to show backwardness, there is no natural guardrail or end point to reservations connected with poverty. This constitutes a clear violation of the Equality Code and of the basic structure** of the Constitution.

8.5. In the alternative, the learned counsel has argued that even if this Court were to accept poverty and income as valid criteria for the grant of reservation then too, the amendment to the extent of '*other than the class mentioned in clause (4) [and (5)]'* should be severed from Articles 15(6) and 16(6) so as to include the poor of all classes without any exclusion or discrimination.

9. Learned senior counsel, Mr. Sanjay Parikh, has relied extensively on the Constituent Assembly Debates to contend that the Assembly was of the clear opinion that the word 'backward' should precede 'class of people'. Therefore, despite being aware of the rampant poverty in the country, the focus of reservations was predominantly on the social stigma attached to the group. Reservation in public employment was given because the framers wanted the backward classes to share State power and for that matter, they had to be provided equal opportunity. The Assembly intended to extend the benefits of affirmative action to only those socially and educationally backward groups who had been excluded from mainstream national life due to historic injustice, stigma and discrimination and thus, bringing in any other criteria, excluding the communities who have suffered such stigmatisation, would be a blatant violation of not only the Equality Code but also the very principles of democracy (sharing of power being necessary to sustain democracy), both of which form part of the basic structure of the Constitution.

9.1. The learned counsel would submit that the criteria for 'backwardness' was always 'social' in nature and 'economic' backwardness was never accepted as the sole criteria. Placing reliance on the decision of this Court in ***Indra Sawhney***, he has contended that by the majority of 8:1, it was held that economic criteria cannot be the sole basis to grant reservation under Article 16. Drawing attention to the theory of 'Substantive Equality' propounded by Prof. Sandra Fredman, the learned counsel has submitted **that reservation solely on economic criteria would violate the principles of substantive equality ingrained in the Constitution, which was directed against identity-based historic marginalization.**

9.2. Learned counsel has further placed reliance on ***Indra Sawhney*** to draw distinction between backward class and weaker sections discussed under Articles 16(4) and 46, respectively. It has been argued that the latter has no limitations and thus, Article 46 cannot be the basis for providing reservation. He has also urged that exceeding fifty per cent limit would violate the twin tests of width and identity, as propounded by this Court in ***M. Nagaraj and Ors. v. Union of India and Ors.*****: (2006) 8 SCC 212**[10] and result in disturbance of equality; and that fifty per cent limit cannot be breached under any circumstance except if a law

[10] Hereinafter also referred to as '***M. Nagaraj***'.

is protected under the Ninth Schedule to the Constitution, which the amendment in question is not. He supported his argument citing ***Indra Sawhney*** and ***Dr. Jaishri Laxmanrao Patil v. Chief Minister and Ors.*****: (2021) 8 SCC 1**[11], wherein it was held that reservation under Article 16(4) should not exceed fifty per cent.

10. Traversing through the history of reservation policy since the year 1872 and the decision of this Court in ***State of Madras v. Champakam Dorairajan*****: AIR 1951 SC 226**[12], Prof. Ravivarma Kumar, learned senior counsel, has submitted that the ratio of decision of this Court in ***Champakam***, that classification on the basis of religion, race, caste, language or any of them was against the ethos of Constitution, has been followed unanimously and consistently by this Court in ***M.R. Balaji*** and ***Ashoka Kumar Thakur v. Union of India and Ors.*****: (2008) 6 SCC 1**[13]. However, the 103rd Amendment reinstates the communal Government Order set aside in ***Champakam***.

10.1. Elucidating further on formal and substantive equality, the learned counsel has submitted that despite ensuring equal opportunity to all, it was still felt necessary to prohibit discrimination specifically on the grounds of religion, race, caste, sex, place of birth so as to halt all inequality and create a more egalitarian society, protecting the interests of every individual through Articles 15, 16, 17, 23, 24 and 35. In order to highlight the intensity of caste-based discrimination in India, he exemplified the prejudices and discriminations faced by Dr. B.R. Ambedkar and M.K. Gandhi and submitted that unless caste is destroyed in the country, equality cannot be attained in true sense of the term.

10.2. The learned counsel has further contended that the term "socially *and* educationally" backward has been employed in Article 15(4) and the expressions employed are not "socially *or* educationally" or "socially *or* economically". The intention behind this was to protect those classes of population who have been historically disadvantaged by birth and not by loss of wealth or by accident. Further, the substantive equality enshrined through Articles 15 and 16 not only makes the provisions to bridge the gap but it also provides the means by which this gap can be bridged. Likewise, under Article 340, the first Backward Classes Commission laid down 22 parameters for the identification of a backward class. The amendment in question does not have any such machinery employed within its ambit for the identification of population who would fall under the EWS category. Relying upon the census report, he has submitted **that the population who would fall under the EWS would be around five per cent, and providing ten per cent of reservation for such a small population, more so to the forward class, is manifestly arbitrary and fraud on the Constitution. Further, this positive discrimination is taking away the rights from rest of the population.**

10.3. The learned counsel has further argued that as per the grounds of discrimination in Article 15, the Constitution has provided a bridge for all the grounds but there, economic deprivation is not mentioned, which clarifies that it was not considered as a basis for discrimination. Applying the principle of *ejusdem generis* to Article 46, he contended that the measures contemplated in the Statement of Objects and Reasons of the amendment in question are in favour of SCs and STs and those weaker sections who are similarly circumstanced to SCs and STs; and definitely is not meant for those castes and sections which are at the other end of the pendulum in the society.

10.4. Relying on the decision of this Court in ***Indra Sawhney***, the learned counsel has posited **that economic criteria cannot be the sole basis to provide reservation**. He would further submit that a class should be homogenous, have a common origin, and have the numerical strength. The EWS created by the amendment in question does not fulfill any of the criteria and hence, cannot be called a class for any State action, particularly the affirmative action. He further emphasised on this

[11] Hereinafter also referred to as '***Dr. Jaishri Patil***'.

[12] Hereinafter also referred to as '***Champakam***'.

[13] Hereinafter also referred to as '***Ashoka Kumar Thakur***'.

argument by intensively reading the opinion of Justice Sahai in ***Indra Sawhney***.

10.5. The learned counsel has further submitted that the amendment in question fails on all the anvils of Equality Code because, if poverty is the rationale behind it and it aims at providing jobs for the poor by way of reservation then, the amendment fails to address as to how the poverty of the forward class is different from that of the SCs, STs and OBCs. Hence, the **amendment in question fails the twin test of rationality and nexus, and violates the basic structure of Constitution.**

11. Learned senior counsel, Mr. Salman Khurshid, has submitted that in India, reservation formed a special part of affirmative action. It is within the larger affirmative action circle that reservation finds its place. Drawing analogy with countries like U.S.A., Israel and Germany, the learned counsel has submitted that indeed affirmative action can be an answer, but it is not the only answer. There are, therefore, many ways of addressing the issue of economic disadvantage other than reservation, as has been done by these countries. He would further submit that the limit for such reservation cannot exceed fifty per cent. except in cases where compelling reasons arise. Arguing on the Equality Code, learned counsel has relied on the classification laid down by this Court in ***E.P. Royappa v. State of Tamil Nadu and Anr.*****: (1974) 4 SCC 3**, to submit **that the present amendment neither has any reasonable classification nor such classification has any nexus with the object to be achieved, hence is violative of Article 14**. Entire list of reserved categories of citizens is caste-based and the amendment did not include any metric or indicator, ignoring the marginalization criteria entirely while granting reservation. He has also quoted the works of *John Rawls* to submit that each person has the same indefeasible right over every claim.

12. "***One law for lion and ox is oppression***", Mr. P. Wilson, learned senior counsel, quoting William Blake, has contested the amendment in question on four grounds. First, granting reservation to upper caste is violation of the basic structure of Constitution as the basis of reservation must be rooted in identified past discrimination which impeded access to public administration and education opportunities. Relying on the decision of this Court in ***Indra Sawhney*** and judgment of the Gujarat High Court in ***Dayaram Khemkaran Verma v. State of Gujarat*****: 2016 SCC Online Guj 1821** wherein similar reservations on the basis of economic criteria were quashed by this Court and the High Court respectively, he has submitted **that economic criteria cannot be the sole basis for providing reservation, and the reservation cannot exceed fifty per cent limit**. Second, he submitted **that reservation in the favour of forward class violates the basic structure of the Constitution** and is, therefore, **unconstitutional**. Third, **classification of EWS is neither reasonable nor valid**. The reason for providing reservation to SC, ST and OBC communities was historical and perpetual discrimination and stigmatization. It was the structural barrier that kept them from the mainstream. **Reservation cannot be used as a poverty alleviation scheme**. Hence, such classification violates the Equality Code under Article 14. Fourth, **the amendment in question fails the width test laid down by this Court** in ***M. Nagaraj*** as there are no limitations or indicators that have been devised to identify the people falling under the EWS. Whereas, for each category, be it SC, ST or OBC, the Constitution is overseeing the reservation by virtue of Articles 366(24), 366(25), 338, 340, 341 etc. Hence, **the amendment in question fails the guided power test.**

13. Learned senior counsel, Mr. K.S. Chauhan, while placing reliance on Constituent Assembly Debates and decision of this Court in ***Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.*****: (1973) 4 SCC 225**[14], has argued **that the 103rd Amendment violates the basic structure of the Constitution as it changes the identity of the Constitution**. He would again submit **that providing reservation solely on economic criteria is against the decision of this Court in *Indra Sawhney*** and **also against the facet of democracy, as democracy ought to be representative**. The learned counsel would argue that economic criteria is transient in nature whereas the inclusion of backward classes under

[14] Hereinafter also referred to as '***Kesavananda***'.

Article 16(4) was on the ground of historical exclusion. **In our society, discrimination finds its root in caste, religion, race, etc. and not in economic condition of a person**. The **classification under Article 14 has to have reasonable nexus and intelligible differentia which the amendment in question**, because of all the aforesaid reasons, **fails to achieve**. He has also submitted that indeed forward class must have faced some discrimination, but the intensity of discrimination is not enough to justify reservation. To support his submission, he has relied on the judgment of this Court in ***Madhav Rao Scindia Bahadur etc. v. Union of India*: (1971) 1 SCC 85** wherein it was held that constitutional philosophy is the obligation of the executive; if a particular class is eligible for identification in a category and it is not identified as such, the constitutional scheme will be destroyed; and if under the constitutional scheme, an obligation is given to a wing and if that wing is not discharging the function, it is a fraud on the Constitution.

14. Learned counsel, Mr. Yadav Narender Singh, while referring to Sinho Commission Report, has submitted that the report, on the basis of which the amendment was enacted, itself stated **that economic criteria would not result in homogenous class.** Learned counsel has argued that in the absence of quantifiable data, one could not create a class for which protective measures are to be taken. The said Report concluded that if poverty is kept as a baseline for reservation, then it should have in its ambit all, irrespective of their class, more so because the poor of SCs, STs and OBCs are worse-off than those of general category. He has further argued that the condition precedent for a protective clause is existence of discrimination. Hence, **protective action for a class that is neither a homogenous class nor is discriminated against, is violative of the basic structure of the Constitution.** Learned counsel has relied upon the decision of this Court in ***Indra Sawhney***, to submit that economic criteria cannot be the sole basis for classification. He has further argued, in the alternative, that even if reservation on grounds of economic criteria is to be given, EWS ought to include those who are living below the poverty line (BPL).

15. Learned counsel, Mr. Shadan Farasat, while adding on to the submissions already advanced by the preceding counsel for petitioners, posited that the **originalist understanding of reservation is that it can solely be granted as an anti-discriminatory measure and not as an anti-deprivation measure**. Hence, the amendment in question cannot sustain itself, as it addresses the deprivation faced by an individual and not discrimination.

15.1. The learned counsel would further argue **that even if it is assumed that reservation can be granted as an anti-deprivation measure, still the amendment violates the Equality Code as it excludes the SCs, STs and OBCs, who are poorer than the poor of forward class, without any intelligible differentia and its nexus with the object sought to be achieved.** Opposing the justification that these classes are already protected by way of Articles 15(4) and 16(4), he has submitted that the purpose of Articles 15(4) and 16(4) is to protect a 'group' and to counter the historical wrong/oppression done to them. Whereas the **amendment in question deals with situational deprivation, mainly economic criteria**, and is **intended to protect an individual**. Purposes and entities of both the protections being different, inclusion of SCs, STs and OBCs in one cannot mean their exclusion from the other.

15.2. The learned counsel has reemphasized on the submissions that statistically, the backward class poor are worse off than forward class poor and their poverty is deeper, more intense and likely to be stickier and persistent. He has relied on Sinho Commission Report, NITI Aayog Multi-dimensional Poverty Index, along with other reports; and has argued that the question before the Sinho Commission was whether there could be reservation for general category people not covered in any other category. The **Report itself stated that the backward class poor are poorer than the upper-class poor**. He would underscore the point that poverty is deeply linked to the caste of an individual and the perception surrounding that status.

15.3. The learned counsel has further submitted that **grant of reservation as a measure of affirmative action is a way for reparation and does not lead to economic upliftment**. The object of economic upliftment of deprived sections of society can be achieved through other measures of poverty alleviation but reservation is not the answer. While contending that Articles 15(1) and 16(1) are part of the basic structure of Constitution and that it is only in furtherance of substantive equality that formal equality can be breached, he has submitted **that exclusion on the basis of caste straightaway breaches formal equality**. Further, **exclusion of those who are arguably more impacted by this criterion violates substantive equality too**, hitting the Equality Code, and resultantly violating the basic structure of the Constitution.

15.4. In another line of arguments, the learned counsel has put forth the proposition that the words "other than" in Articles 15(6) and 16(6) should be read as "in addition to", thereby including SCs, STs and OBCs within them and furthering the basic structure. He has placed reliance on the decision of this Court in ***State (NCT of Delhi) v. Union of India and Anr.*****: (2018) 8 SCC 501** to submit that if two interpretations are possible – one which destroys the basic structure and the other which enhances it – then purposive approach enhancing the basic structure of the Constitution is to be taken and not the literal approach. He has concluded the submissions while quoting from the judgment of this Court in ***K.C. Vasanth Kumar and Anr. v. State of Karnataka*****: 1985 Supp SCC 714**[15] that lower the caste, the poorer are its members.

16. Learned counsel, Ms. Diya Kapoor, while stressing upon the Equality Code and it being part of the basic structure, has argued on two facets. First, as to **whether the inclusion of new class of reservation solely on the basis of economic criteria was constitutionally permissible**; and second, as to **whether the exclusion of SCs, STs and OBCs from this newly created class, was constitutionally permissible.** She mapped the historical background of reservations for backward classes since 1917 until the Constituent Assembly Debates, where Dr. B.R. Ambedkar and Mr. K.M. Munshi supported the use of the term 'backward' so as to grant special benefits to the classes qualifying that criterion and to neutralize the oppression faced by them. She would submit that such classification was based on long continuing historical oppression faced by these classes. Thus, to ensure their representation, reservations were provided as a means to foster the equality and fraternity of the country, with various checks and safeguards.

16.1. The learned counsel has further argued **that reservation is for participation and representation and cannot be used for poverty alleviation**. Reservation in public employment is to reverse discrimination and to equalize representation. Providing government jobs cannot pave a way for economic upliftment whereas, other ways of providing subsidies etc., is a kind of affirmative action to eliminate poverty. Indeed, poverty alleviation is a goal for the State to strive for as per Directive Principles of State Policy[16] but, reservation is not a way to alleviate poverty, as is evident from the statistics that despite decades of reservation in favour of SCs, STs and OBCs, they are still poor. Relying on the decision of this Court in ***Minerva Mills Ltd. and Ors. v. Union of India and Ors.*****: (1980) 3 SCC 625**[17], she would submit **that alleviation of poverty has to be done without trampling on Fundamental Rights**. Welfare steps can be taken under DPSP but it cannot be done under Article 15 unless there has been discrimination on the grounds mentioned in Article 15(1), as otherwise, the character of Article 15 is changed and results in abrogating the Fundamental Rights. As iterated by this Court in ***Indra Sawhney***, Article 16(4) has to be in consonance with and in furtherance to Article 16(1). Similarly, Article 16(6) also has to be in furtherance of equality of opportunity under Article 16(1). So, if Article 16(6) is violative of Article 16(1), it cannot sustain itself in the scheme of the Constitution.

[15] Hereinafter also referred to as '***Vasanth Kumar***'.

[16] 'DPSP', for short.

[17] Hereinafter also referred to as '***Minerva Mills***'.

16.2. Further relying upon 3-Judge bench decision of this Court in ***Indra Sawhney v. Union of India*: (2000) 1 SCC 168**, the learned counsel has submitted **that by providing reservation to forward class, the identity of backward class is erased and therefore, such reservation is illegal, hitting at the roots of the Constitution**. Moreover, if the forward class becomes backward, it can come under OBC so as to benefit from reservation. She would reason that the 103rd Constitution Amendment is discriminatory to SCs and STs as **the people falling in EWS are approximately five per cent and for these five per cent of people ten per cent of reservation is provided**. The learned counsel would further submit that the amendment in question is arbitrary too, for there is no mechanism/ procedure laid down for it, as under Article 340, for identification of genuine EWS.

17. Learned counsel, Dr. M.P. Raju, has based his submission on the ground that the amendment in question is a caste-based reservation that excludes the historically oppressed groups (SC/ST/OBC) from its coverage and is thus, destructive to the aim of 'casteless society', which is the Preambular vision forming the basic structure of the Constitution. Learned counsel has submitted that this amendment has created two levels of classification – first, between the classes already covered under Articles 15(4) and 16(4) (socially and educationally backward classes) and those who were not (forward class/non-reserved), which has resulted in caste-based classification; second, within the forward class between those who were economically weaker and those who were not. Such classification, in his opinion, not only defeats the goal of casteless society, as envisaged by the Constituent Assembly, but also **attempts to create vertical reservation inside a vertical reservation, which is not permitted under the Constitution.**

17.1. The learned counsel has further submitted that, as held by this Court in ***Indra Sawhney***, if casteless-ness is an ideal of the Constitution, and if this ideal goes into the basic identity of the Constitution, then the constitutional amendment, even if passes the test of equality, violates the basic structure. He has also urged that the condition of 'adequate representation' that controlled Article 16(4) is intentionally excluded from Articles 15(6) and 16(6). Reservation, once starts, has to end. It cannot be in perpetuity. He has further argued that the amendment in question is violative of the Constitution inasmuch as grant of reservation to already sufficiently represented classes while excluding those who were inadequately represented (SC/ST/OBC) offends not only the Equality Code but also the principle of Fraternity, as recognised in the Preamble to the Constitution. He has supported his contentions while relying upon decisions of this Court in ***T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.*: (2002) 8 SCC 481** and ***V.V. Giri v. D.S. Dora*: (1960) 1 SCR 246**.

18. Learned counsel, Mr. Kaleeswaram Raj, has based his submissions on modern jurisprudence citing academic scholarship[18] to submit that two things are to be considered while dealing with discrimination law. First, the immutability and second, it should constitute fundamental choice. **Relativity of poverty is antithetical to immutability**. He has further submitted that the 103rd Amendment in the context of exclusion, made the forward communities as protected group and the backward class as cognate group, which is impermissible. The amendment in question strips off the right of backward class candidates to contest the seats kept in open category, to which they are entitled to. The learned counsel has argued that this amendment fails the preference test by giving preferential treatment to forward class and taking it away from backward class who are inadequately represented. He has further submitted **that the 'living tree' approach should be applied to interpret the Constitution as per the changing circumstances of the society**.

18.1. Learned counsel has also argued **that Fundamental Rights are individualistic in nature**; and while relying on the decision of this Court in

[18] '*A Theory of Discrimination Law*' by Tarunabh Khaitan, Oxford University Press 2015.

***Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*: (2017) 10 SCC 1**, he would submit that the individual is the focal point because it is only in the realization of individual rights, that the collective well-being of the group can be determined and hence, it remains baseless to say that collective rights have been provided to the SC/ST/OBC as a group.

19. Learned counsel, Mr. Pratik Bombarde, has submitted that **the amendment in question changes the identity of Fundamental Rights while omitting to take into account the crucial factor that social backwardness was a 'cause' of economic backwardness and not its 'consequence'**. While relying on the decision in ***Saurav Yadav and Ors. v. State of Uttar Pradesh and Ors.*: (2021) 4 SCC 542** which held that open category is open to all and horizontal and vertical reservations are methods of ensuring representation in public places, he has argued that the right to equality of the persons belonging to SC, ST and OBC communities is impacted by reducing their seats in open category. He would reiterate that rule of *ejusdem generis* shall apply while reading Article 46. Lastly, he has submitted that **confining each social category to its extent of reservation would result in communal reservation, which, in turn, would result in breach of Equality Code and thereby, damage the basic structure of the Constitution**.

20. Learned counsel, Mr. Akash Kakade referred to the phraseology of the provisions under consideration and submitted that while Articles 15(4) and 15(5) refer to socially and educationally backward classes, Article 16(4) is directed towards backwardness and inadequate representation. According to him, **the impugned provisions of Articles 15(6) and 16(6) have left aside the key elements of "social backwardness" and "inadequate representation" while providing for EWS reservation.** These provisions, therefore, are rather antithetical to the spirit of the existing provisions. The learned counsel has again urged that Article 46 should be read under the rule of *ejusdem generis* and by excluding SC, ST and OBC communities, the said rule is violated. According to the learned counsel, **keeping SC, ST and OBC communities outside of its scope and bringing in economically weaker sections within it was never the idea of Article 46**. He has also submitted that **no constitutionally recognized commission has been set up for determination of the financial incapacity/capacity of a candidate**, as in the case of OBCs.

21. Learned senior counsel, Mr. Shekhar Naphade, has argued **that there was no dimension of equality, other than what was rooted in Articles 14 to 16 of the Constitution**. Relying on passages of judgments of A.N. Ray, C.J. and P. Jaganmohan Reddy, J. in ***Kesavananda***, which indicated that new dimensions of equality could be discerned having regard to new challenges, he has submitted that those observations were not endorsed by other judges. As a result, the amendment cannot sustain itself on the ground that it gives shape to another facet or dimension of equality. Learned counsel has further contended **that economic criteria cannot be the sole criteria for the basis of classification**, and if it is to be taken as a sole criterion, ***Indra Sawhney*** has to be revisited, which cannot be done by this Bench of 5 Judges.

22. Learned senior counsel, Mr. Jayant Muthuraj, in addition to the arguments already advanced, would submit **that ten per cent reservation in open category in favour of forward class reduces the availability of seats in open category for other classes and communities, in particular the persons belonging to the creamy layer category in SEBCs/OBCs.** This, according to him, **would damage the basic structure of the Constitution.**

23. Learned senior counsel, Mr. Ravi K. Deshpande, and the learned counsel, Mr. Sachin Patil, Mr. Shashank Ratnoo, Mr. Varun Thakur, Mr. P.A. Noor Muhammad and Mr. A. Selvin Raja have also made their submissions as interveners. All of their submissions, which are akin to the submissions already noticed above, need not be elaborated. However, in sum and substance, their additional submissions had been that **the amendment in question, which states '*not more than ten per cent of the total seats in each category*' has to be interpreted as providing ten per cent reservation for EWS in each category**. One of the interveners provided the statistics as to the percentage of people working in each category to submit that

the exclusion of SCs, STs and OBCs is invalid as they are still inadequately represented in State services. Further they submitted that the current strength of Bench is not competent to overrule ***Indra Sawhney*** wherein it was explicitly held that reservation cannot be based solely on economic criteria. Yet further, discussing the **power of Parliament under Article 368**, it was posited that the **Parliament has the power to amend the Constitution by way of 'addition, variation or repeal' and not by breaking down the basic structure of the Constitution.**

In part challenge to the amendment in question

24. Learned senior counsel, Mr. Gopal Sankaranarayanan has taken a stance different than other petitioners, and has contended **that the amendment in question is violative of basic structure of the Constitution only to the extent of the words '*in addition to the existing reservation and*' which need to be severed** and that the **rest of the part, which provides classification on the economic criteria for extension of special provisions for the advancement of economically weaker sections** excluding classes already covered under Articles 15(4) and 16(4), **was permissible**.

24.1. The learned counsel has, otherwise, supported the amendment in question on two grounds. First, that the insertion of the Economically Weaker Sections is perfectly valid as a class for the extension of special provisions for their advancement, admissions and for reservations in posts. He has submitted that the classification on the basis of economic criteria has been recognized in plethora of measures introduced by the State from providing housing, admission in schools or hospitals, to several statutes for their upliftment. Further, **this Court** in ***M.R. Balaji***, ***R. Chitralekha and Anr. v. State of Mysore and Ors.*: (1964) 6 SCR 368** and ***Vasanth Kumar*** **has accepted poverty as an indicator of backwardness, while considering reservation**. It has been argued that the present constitutional amendment has removed the basis of ***Indra Sawhney*** (bar on using economic criteria as a sole determinative of backwardness); and in fact, **such an amendment would further the goal of economic justice, thus strengthening the basic structure of the Constitution**. The learned counsel has supported his submission with reference to the decision in ***Waman Rao and Ors. v. Union of India and Ors.*: (1981) 2 SCC 362**[19].

24.2. Second, at divergence from other submissions **regarding exclusion of SC, ST and OBC communities**, he has argued **that such an exclusion is permissible as the exclusion is not of 'castes' but of 'classes' who are already receiving the benefit of special provisions**. Further, the SCs, STs and OBCs receive political reservations as well without having any ceiling limits as such whereas, EWS reservation is capped at ten per cent and is not extended to political reservation, thereby providing a balance with sufficient guardrails and safeguards. Therefore, **this amendment was long due, stepping away from caste-based reservation to provide reservation for that class of persons who had hitherto been overlooked.**

24.3. Advancing his submission **that the amendment in question, to the extent of '*in addition to existing reservation*', is violative of the basic structure of the Constitution**, the learned counsel has given **three-fold reasoning**. First, the expression **'*in addition to*' cements reservation, perpetuating the existing reservations within the Constitution as a permanent feature which violates basic structure of the Constitution** as laid down in various decisions including those in ***Champakam***, ***M.R. Balaji***, ***Indra Sawhney***, ***Ashoka Kumar Thakur v. State of Bihar and Ors.*: (1995) 5 SCC 403** and ***Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors.*: (2009) 15 SCC.**

458. Secondly, the amendment in question inserts **enabling provision "*in addition to*", making EWS reservation reliant on those of SCs, STs and/or OBCs, which effectively converts enabling provisions in Articles 15(4), 15(5) and 16(4) into enabled provisions, inconsistent with the ethos and guiding principles of the Constitution**. Lastly, on the extent of reservation, he would submit that the **amendment providing reservation "*in addition to existing reservation*" breaches the fifty per cent ceiling limit, which is now not only a part of constitutional interpretation of reservation provisions but is also a part of basic structure of the Constitution**. He has further emphasised that in more than 54 judgments of this Court in over 60

[19] Hereinafter also referred to as '***Waman Rao***'.

years, it has been repeatedly stated that fifty per cent ceiling limit must be maintained when reservations are activated while interpreting Articles 15 and 16. This, as per his contention, lends enough strength for fifty per cent ceiling limit to be a basic feature of the Constitution. In support of his submission on the extent of reservations, learned counsel has relied upon the decisions in ***Bhim Singhji v. Union of India and Ors.*****: (1981) 1 SCC 166**[20], ***M. Nagaraj*** and ***Dr. Jaishri Patil*****.**

In support of the amendment in question

25. Learned **Attorney General for India, Mr. K.K. Venugopal**, has posited **that the 103rd Amendment does not violate the basic structure of the Constitution, rather fosters it**. Second, the **exclusion of those classes already covered under Articles 15(4) and 16(4) from the proposed reservation did not breach the Equality Code. Third, the fifty per cent limit is not a sacrosanct rule.** Lastly, the **benefit to EWS with respect to admission in private aided or unaided educational institutions does not violate Article 14**, as has been settled by this Court.

25.1. While quoting from ***Bhim Singhji***, the learned Attorney General has submitted that **a mere violation of Article 14 does not violate the basic structure of the Constitution unless '*the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice*'**. Relying on ***M. Nagaraj***, he has submitted that **a constitutional amendment can be struck down only when it changes the identity of the Constitution**. In support of his submissions, he has also relied on the decisions of this Court in ***Raghunathrao Ganpatrao v. Union of India*****: 1994 Supp (1) SCC 191**[21], ***Ashoka Kumar Thakur*** and ***Minerva Mills*****.**

25.2. Learned Attorney General has placed reliance on the decision of this Court in ***M. Nagaraj***, **as to dynamic interpretation of the Constitution to strengthen its Preambular vision**; and has submitted that Articles 38 and 46 along with Preamble to the Constitution enjoin a duty on the State to eliminate social, economic and political inequalities and to promote justice. He has further argued that **this Court has, over the years, repeatedly recognized that it was desirable to use poverty as the only basis for affirmative action and that it is poverty or economic deprivation that results in social and educational backwardness**. He has relied on the decisions of this Court in ***Vasanth Kumar*** and ***Ashoka Kumar Thakur*** to support his contention. He has further submitted **that the creation of new class fosters the vision of 'Economic Justice'**, as set out in the Preamble, hence **strengthening the basic structure of the Constitution.**

25.3. Learned Attorney General has further contended **that the exclusion of already covered classes does not violate Equality Code as the EWS among the SC, ST and OBC communities are already enjoying the benefit of affirmative action in their favour** by way of reservations in educational institutions and public employment, seats in Legislature, etc., to attain an equal status - socially and educationally. However, the EWS among the classes not covered under any of provisions preceding Articles 15(6) and 16(6) do not have any special provision made in their favour except for reservation by way of the present amendment. Further, **this ten per cent carved out for EWS is in addition to the existing reservation in favour of SEBCs**; meaning thereby that **it does not in any way affect the reservation up to fifty per cent for the SEBCs/OBCs/SCs/STs.**

25.4. As to the extent of reservation, learned Attorney General has submitted **that the fifty per cent cap as laid down in *Indra Sawhney* is for the classes covered under Articles 15(4), 15(5) and 16(4)**. Therefore, extending the benefit of ten per cent to these classes would exceed the reservation made for them beyond fifty per cent and that would be violative of ***Indra Sawhney***. He has also contended that **this fifty per cent rule could be breached in extraordinary situation**, as held by ***Indra Sawhney***; and is, **therefore, not an inviolable rule or part of the basic structure of the Constitution.**

25.5. On the **question of private unaided educational institutions**, learned Attorney General has relied on the decision in ***Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.*****: (2012) 6 SCC 1** which **upheld twenty-five per cent. reservation in favour of EWS under the Right of Children to Free**

[20] Hereinafter also referred to as '***Bhim Singhji***'.

[21] Hereinafter also referred to as '***Raghunathrao***'.

and Compulsory Education Act, 2009, which was **further affirmed the by 5-Judge Bench** in ***Pramati Educational and Cultural Trust (Registered) and Ors. v. Union of India and Ors.*: (2014) 8 SCC 122[22].**

26. Learned Solicitor General of India, Mr. Tushar Mehta, has submitted **that to set aside a constitutional amendment, very high judicial threshold is needed**. He would submit that **a constitutional amendment may even touch upon the basic structure but unless it is shown that it fundamentally alters the basic structure or basic features of the Constitution, it cannot be struck down under judicial review**. In support of his contentions, learned Solicitor General has placed reliance on the said decisions in ***Raghunathrao***, ***Bhim Singhji*** and ***Kesavananda*** as also on the decision in ***Indira Nehru Gandhi v. Raj Narain and Anr.*: 1975 Supp SCC 1[23]**. He has further argued **that the amendment in question, instead of hitting or disturbing the basic structure, rather strengthens the Preambular vision of the Constitution i.e., of providing economic justice to its people along with social and political justice.**

26.1. Learned Solicitor General has further argued **that the exclusion of classes already covered under Articles 15(4) and 16(4) does not violate the Equality Code**; and that from the time of the decision in ***Champakam*** to the recent decision in ***Dr. Jaishri Patil***, the **understanding and concept of equality and reservation have changed and evolved with time, and the reservation itself has been treated as a part and parcel of the Equality Code that furthers substantive equality**. The **Constitution has recognized different zones of affirmative action,** whereby it **extends reservation and special provisions as to the needs of each section of the society**. For instance, all SEBCs do not have any reservation in Parliament, however, SCs and STs have been given a secured representation in Parliament. Learned Solicitor General has also submitted **that except for the open category, the SCs, STs and OBCs are not permitted to migrate to the other vertical reservations;** and similarly, the **Constitution has created another vertical zone for EWS category, which exists outside the fold of pre-existing reservations**. Further, he would submit that ten per cent reservation in favour of EWS would result in miniscule delimitation of the available seats in favour of SC, ST and OBC communities (SC: reduces from 65 per cent to 55 per cent; ST: reduces from 57.5 per cent to 47.5 per cent; and OBC: reduces from 77 per cent to 67 per cent).

26.2. On the **question of fifty per cent ceiling limit**, learned Solicitor General has again submitted **that this percentage could be exceeded in exceptional circumstances for, being neither a fundamental tenet of the Constitution nor a part of its basic structure**. He lastly contended that the **validity of a constitutional amendment cannot be tested on possible apprehensions or absence of guardrails**.

26.3. Mr. Kanu Agrawal, learned counsel, has supplemented the submissions of learned Solicitor General **that the amendment in question has guardrails inbuilt in it by having the upper limit of reservation fixed at ten per cent unlike Articles 15(4), 15(5) and 16(4).** He further submitted **that exclusion of other classes is inherent in the concept of reservation** and **therefore, the exclusion of SC, ST and OBC communities already covered under preceding provisions is not violative of Equality Code.** Thus, the **exclusion clause '*other than*' is an "opportunity cost" which does not violate the basic structure of the Constitution**. Further, he has submitted that ***Pramati Trust*** is squarely applicable to Article 15(6) as well as to making of special provisions in relation to admission to the private unaided institutions.

27. Learned senior counsel, Mr. Mahesh Jethmalani, has submitted **that the amendment in question takes into account the changing conditions of society** as iterated in ***M. Nagaraj*** and **hence, purposive interpretation of the Constitution has to be resorted to**. He has further submitted that, as held in ***Dr. Jaishri Patil***, **there must be harmony between Fundamental Rights and DPSP, which the amendment seeks to strike**. Further, learned counsel would submit **that the challenge in *Indra Sawhney* was to an Office Memorandum** and **the view of the Court that economic criteria cannot be the sole basis ran contrary to its own view of excluding creamy layer from OBCs on economic basis**. Further, ***Indra Sawhney*** **tested the Office Memorandum on the tenets of Article 16 alone.** Here, **the amendment in question, *being a constitutional amendment*, has to be tested on the threshold of violation of basic structure to an extent that it changes the identity of the Constitution.**

(to be continued)

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[22] Hereinafter also referred to as '***Pramati Trust***'.

[23] Hereinafter also referred to as '***Indira Nehru Gandhi***'.

(Carried from p. 14→)

of a vanguard party leading the workers to the victory of the socialist revolution and in their name managing the new society. But the most important thing was that the Bolsheviks saw the impending Russian revolution only as a prelude to the world revolution.

Vladimir Lenin was a follower of Karl Marx in the sense that he, like Marx, believed that socialism could be built only after the revolution had won in the advanced capitalist countries. For Lenin, **Russia was only a springboard from which the revolution was to begin its victorious march** and embrace the developed countries.

The **Bolshevik Project did not remain unchanged**. From its inception to its transformation into a new social order in the 1930s, the Project **has undergone a complex evolution**. In 1917 – early 1918, it contained many more elements of the utopia that Lenin learned from the late Marx (the rejection of parliamentarism and its replacement by the "republic of Soviets", the general arming of the people, workers' control in production). However, then, **in the conditions of a fierce civil war, this Project was transformed into a mobilization model of the state - *a military camp with the nationalization of property, universal forced labor and super-centralized distribution***. Some of the Bolsheviks even then came to the conclusion that the model called "war communism" was, in fact, the practical embodiment of their Project. However, in the early 1920s, for its final approval in practice, the Bolsheviks did not have [necessary] forces. Therefore, **in the 1920s, they were forced to compromise and create a social coalition with various social strata that advocated free trade, but "agreed" to maintain a one-party political regime in the country.**

The **social compromise of the 1920s**, which **allowed for limited private initiative in the economy and a certain freedom of creativity in art**, was **a temporary, transitional phenomenon**. Fundamentally important changes, which had, perhaps, a decisive influence on the fate of the Bolshevik Project, took place at the beginning of this decade. After the defeat of the Revolution of 1919 in Germany and the failed campaign of the Red Army in Poland in 1920, it **became clear that the hopes for a world revolution had not come true**. This **meant that building socialism in Russia (USSR), a country with a medium level of industrial development and a small working class, would have to be "in a hostile capitalist environment."** Under such conditions, **the Bolshevik Project inevitably lost even the theoretical perspective of democratic development**: it could develop only within the framework of a mobilization model in which elements of modernization and counter-modernization were bizarrely intertwined, and which gave rise to numerous contradictions. It is **no coincidence that, being initially secular and enlightened, the Bolshevik Project later came to the pagan cult of the Leader.**

Nevertheless, **despite the anti-democratic transformation, the Bolshevik Project managed for a long time to maintain the egalitarian ideology of the early years of the revolution**. It was **this ideology that helped him find a "second wind" during the Khrushchev Thaw**. Its **humanistic orientation manifested itself in the sphere of culture and ideology**, where the main theme was the free development of the individual. However, **the political system and the economic system remained unchanged** – this **predetermined the defeat of the Thaw.**

The **ideas of the Revolution of 1917 became a source of inspiration for the policy of Perestroika**, when in the second half of the 1980s the leadership of the USSR, headed by **Mikhail Gorbachev, attempted to create a new society - "socialism with a human face"**. However, the **resistance of the ossified socio-political and socio-economic Soviet system** that had developed in the previous decades **turned out to be so strong that Perestroika was forcibly interrupted.**

In modern Russia, the **legacy of the Soviet project is still the subject of fierce political debate**, **especially when it comes to the lost status of a superpower and the social guarantees** that the citizens of the former USSR had and **that modern Russians have lost.** And although **today there is not a single significant force in the country's political arena that would proclaim its goal to return to the Soviet past**, at the **symbolic level, the attitude towards the 1917 revolution still remains** and, most likely, **will still remain one of the criteria for political identification**, a line separating different political forces and adherents of different ideologies.

Legacy of the Revolution:
Secularization and Enlightenment

The **revolution opened the way to the secularization of public consciousness and social life in Russia**. This was due to the fact that the **project of social renewal, which was launched by the Revolution, had undeniable enlightenment roots**. In this regard, it is not so important which particular direction of the Russian revolutionary movement fell to put it into practice. Just as the Girondins and the Jacobins, despite all their differences and mutual hostility, were children of the Great French Revolution, all Russian socialists at the turn of the 19th and 20th centuries, regardless of their degree of moderation or radicalism, were inspired by the ideas and spirit of the Enlightenment. They all believed that history is driven by natural rather than supernatural forces, that the historical process occurs not in a chaotic, but in a natural way, that the prosperity of man is the goal of social development, that social life is connected with progressive progress, and not with traditionalist movement in a circle. Despite their rampant and radicalism, the Bolsheviks also shared all of the above postulates. This means that, despite the undoubted extremes and grandiose costs of the Bolshevik revolution, it developed an enlightenment ideology in Russia. Decades of terror and violence imposed by the totalitarian system, to a certain extent, obscure this circumstance, but do not cancel it completely. Thanks to the revolution, a paradigm was established in Russian culture, according to which history is not an endless reproduction of the same realities inspired from above, but a product of conscious human efforts.

Nowhere did the enlightenment ethos of the 1917 revolution manifest itself more clearly than in the secularization of Russian social life and public consciousness. The atheism of the communists horrified the opponents of Bolshevism; but even among them, many could not but admit that the inveterate symbiosis of official Orthodoxy with the monarchy turned into one of the main vices of the Russian political system of the pre-revolutionary period. The revolution was called upon to solve a number of long-standing problems that Russian society could not cope with for centuries: one of them was bringing Russian life to secular and secular norms, without which modernization is impossible. Despite the ugly forms through which secular practices were asserted after the Bolsheviks seized power, the revolution laid the foundation for Russia's transformation into a secular state. The church was decisively separated from the state, the sphere of education was freed from church guardianship. For Russian society, this was a colossal step forward, realizing the potential of free thought and free creation. A real worldview revolution took place in the country: apparently, nowhere in the world did the scientific worldview receive such support as in Soviet Russia, since science was considered a universal tool for overcoming any social problems.

The revolution forced a new look at the historical path of the Russian Orthodox Church. In the post-revolutionary years, the previously considered marginal conviction of several generations of Russian revolutionaries was established, according to which the main reason for the spread of unbelief and atheism was that in Tsarist Russia the church turned into a state institution that defended the sanctity of autocracy and archaic social practices. In relation to religion, the Russian Revolution of 1917 repeated the path of the French Revolution of 1789. In this regard, it is appropriate to note that at the beginning of the 21st century, the politically supported expansion of religion into broad areas social life is one of the manifestations of the archaization of Russian society.

The rationalization of public consciousness resulted in large-scale projects of social planning: the approval of the ideology of the Enlightenment brought with it the practice of purposeful, conscious, rational design of the future, that is, a new kind of utopia appeared. It is characteristic that in Russia utopian consciousness had a strong

position even before, since the traditional Russian peasant utopia painted a picture of a world in which justice and prosperity would reign "by themselves". However, post-revolutionary utopianism was built on a fundamentally different foundation: it generated a utopia not of feelings, but of reason, a rationally justified conviction that the world can be made better by human effort. This feeling gave a colossal charge of social creativity. In addition, the socialist utopia was not local, but global, and as such it inscribed Russia into world civilization.

In this sense, the spirit of the revolution of 1917 was fatal for the rejection of the idea of a world revolution and a reorientation towards the construction of socialism in one single country. The localized utopia turned into a subject of state engineering, and became the embodiment not so much of freedom as of violence, and the Soviet state focused on the "reforging" of man - a task that required the imposition of a powerful totalitarian system.

Only **at the end of the Soviet era was there a brief period when the Enlightenment heritage had a new chance**. **Perestroika**, which began in the mid-1980s, **set a new algorithm for thought and action: it once again reminded Soviet society of universal values and global thinking**, under the auspices of which, in fact, the Russian revolutionary renewal of the early 20th century began. The desire to unite the efforts of all mankind for the sake of solving fundamentally new problems faced by the world, the conviction that different societies should be guided by the same universal values, faith in the victory of reason over the elements of the irrational - these ideas of the perestroika era revived the constructive principle in the heritage Revolutions. Ultimately, the idea that the world must and will change, because change - unlike stagnation - is a normal, healthy phenomenon, equally inspired all revolutionary eras: neither 1789, nor 1917, nor 1985- and were no exception here.

In **Soviet history, the Enlightenment-inspired revolution of 1917 itself departed from Enlightenment ideals**. But she [it] **began an important spiritual work, which allowed our society to join the ideas**, the mastery of which by that time had **already become a sign of entering modernity**. Moreover, the overcoming of Bolshevism, historically inevitable due to its innate vices, led Russian society to the fact that along with the "water" the "child" was thrown out: comparing the Russian present with the "communist" past, one can detect an obvious retreat of the Enlightenment spirit. The current Russian society is becoming more and more archaic, obscurantist, inert. It is becoming more and more difficult for him to solve the problems facing him, he is trying to move into the future, constantly appealing to the past, which means that society stops developing. Modern Russia faces ever new, even more acute challenges, and the centenary of the 1917 revolution is a good reason to think about how to respond to these challenges.

Revolutions of 1917:
Emancipation and Social creativity

Despite the fact that the System, born as a result of the victory of the Bolsheviks, politically rather quickly evolved in an anti-democratic, repressive direction, the revolutionary impulse of October contributed to a powerful surge of projects for the social reorganization of many spheres of public life. They were closely connected with the rise of utopian ideas that accompanied the modern revolutions. At the same time, the implementation of new ideas often turned out to be closely intertwined with traditional practices.

On the one hand, the Revolution inspired political participation and self-organization, which led to the emergence of institutions of direct democracy (committees and councils at various levels). These institutions, the autonomy of which, unfortunately, was extremely short-lived, nevertheless, created a precedent for the massive "public use of reason", in Michel Foucault's terms. The Revolution has made it possible for those who have never before spoken in the public sphere to speak for themselves.

On the other hand, the **Bolsheviks effectively used the powerful "semiotic weapon" of centralized politics to legitimize their own power**. This **applies not only to the change of state symbols** (flag, coat of arms and anthem), **but also to everyday practices**. **Old religious rituals were transformed into new ones** by replacing signs. So, there were **Oktyabrins instead of christenings**; the "**red wedding**", at which **the newlyweds sat at the table under a portrait of Lenin; funeral rite in which religious hymns were replaced by mournful revolutionary songs; and the "red calendar", the introduction of which served as a means of interiorizing revolutionary temporality.** Thus, the establishment of the Soviet system was initially based not only and not so much on rational principles, but on non-reflexive practices, many of which were of a quasi-religious nature. The **formation of a ritual system of socialization subordinated to ideological dogmas, together with the gradual centralization of power in the hands of the party apparatus, made it impossible for the individual to have autonomy in both the public and private spheres.**

Despite the Bolshevik imperative of total control over the processes of emancipation, from the very beginning of the Revolution and until the end of the 1920s, in many areas there was a spontaneous grassroots egalitarianization of social relations. So, despite the increased attention of the Bolsheviks to the problem of "revolutionary morality", until the mid-1920s, one can find multiple examples of the manifestation of sexual emancipation, gender equality and the rejection of "traditional" forms of family relations. The idea of gender equality in fashion design was introduced by such prominent artists as Alexandra Exter, Vladimir Tatlin, Alexander Rodchenko.

In the 1920s, there was a significant democratization of cultural practices. In this context, the antagonism of “bohemian” futurism (with its radical rejection of any old forms in art) and Proletkult, a phenomenon much more “conservative” in terms of content, but at the same time innovative in form, seems to be very significant. If the Futurists excited the imagination of the revolutionary intelligentsia, then Proletkult resonated more with the proletariat, especially in small towns.

The ideology of Proletkult consisted not only and not so much in the invention of fundamentally new means of expression, but in building equal relations between members of creative teams, as well as in overcoming the boundaries between the artist and the audience.

One of the most significant social phenomena of the 1920s is communalism, which acted as a kind of "laboratory" of revolutionary life. Communes did not have time to become a mass phenomenon, despite the rapid growth in their number after the end of the Civil War. The spread of communes was due to the desire to save workers (primarily women) from the oppression of everyday needs, thereby releasing creative energy for self-improvement. Despite the ambivalent attitude of the government towards such forms of self-organization, until the early 1930s, it positively assessed the role of communes and supported them materially until the end of the first five-year plan.

Contrary to the popular notion that there is no alternative to the trajectory of Russia's development after the monopolization of power by the Bolsheviks, the history of the 1920s is replete with examples of the diversity of future projects. Thus, fierce debates regarding new forms of organization of living space were actively conducted by architects, planners and economists until 1930, when the resolution of the Central Committee of the All-Union Communist Party of Bolsheviks “On work on the restructuring of everyday life” was issued.

In particular, a radical alternative to the centripetal method of organizing social life was proposed in 1929 by the sociologist Mikhail Okhitovich, the author of the concept of deurbanism. Working in a team of constructivist architects under the leadership of Moisei Ginzburg, Okhitovich rejected the idea of a communal house, believing that forced intimacy between people prevents the full development of a free personality. Instead of the model of a social

city, he placed at the center of his project mobile residential cells stretched along the roads, located in the middle of nature and equipped with a service network. Okhitovich's "horizontal" concept, built on dispersal, escaping from the loci of concentration of capital and power, continues to inspire modern architects.

The period of **Stalin's rule, starting from the second five-year plan, is characterized by the leveling of the diversity of future horizons, the total dominance of centripetal processes over centrifugal ones, "vertical" relations over "horizontal" ones**. Nevertheless, in subsequent periods of Soviet history, attempts to revive the revolutionary aesthetics of the 1920s are found. Soviet architecture, monumental painting, sculpture and industrial design, designed to objectify the utopian imagination, ultimately turned Soviet ideals - labor, scientific and technological progress, friendship of peoples - into everyday life. Due to the presence of this kind of "everyday life" in the life of most post-Soviet cities, the space of the former USSR still retains signs of a common societal culture.

Thus, **Khrushchev's project of mass housing construction was not only the antipode of Stalin's "vertical" aesthetics, but also a kind of fulfillment of a utopian promise** - to provide the majority of Soviet citizens with separate apartments. Moreover, the implication of the Soviet principles of urban planning in the current period is the absence of strict social segregation – the delimitation of city blocks along class and / or ethnic principles. In the conditions of a massive immigration influx, this circumstance favorably distinguishes post-Soviet megacities from largest cities in Western Europe and North America. However, this part of the "Soviet heritage" is seen as very fragile and at the present time Russia risks losing it due to the transformation of former public goods into private property, and most recently due to **the policy of mass demolition of Khrushchev buildings, leading to a violation of the basic principles of functional zoning** – urban space.

Despite all the contradictions, the **experience of the revolution cannot be reduced solely to its destructive component**. Ignoring the grassroots demand for social justice in various spheres, coming from the thickness of the mass strata, which was one of the fundamental causes of the 1917 revolution, significantly impoverishes the analysis of its causes and results. ... Refusal to understand the underlying socio-political and cultural factors that gave rise to the revolution of 1917, in its extreme form, turns into numerous conspiracy delusions. Because of this neglect, the revolution is often interpreted as a conspiracy of extremist forces that pursued selfish goals and, moreover, relied on solid outside support.

The **real tragedy of the revolution was that most of the projects for the future it gave birth to were ultimately excluded from public life**. The lack of faith in the potential for self-organization of society, which is immanent in Bolshevik managerial thinking, and the dominance of disciplinary techniques generated by it, not only turned revolutionary utopias into the dystopia of the Stalin era, but also continue to be reproduced in current administrative practices.

Along with this, the revolutionary utopianism of the first quarter of the 20th century is an important legacy of Russian intellectual life in the 19th century - its inherent ideals of altruism and the desire for liberation from any form of moral humiliation. **Even the Stalinist repressive machine failed to completely destroy this heritage**, and **it was precisely this heritage that gave rise to hopes for renewal, first during the Thaw period, and then – Perestroika**. This heritage remains a starting point for those who are currently looking for alternative forms of imagination of the future, referring to the history of the Soviet 1920s.

Legacy of the 1917 Revolution: Impact on the World

The **Russian Revolution of 1917 was the result of not only internal but also external factors**. Therefore, it is **legitimate to consider the crisis and collapse of tsarist Russia in a series of similar processes that simultaneously affected all the continental empires of the European Periphery**. At the same time, **the Russian Revolution left an indelible mark on the history of the twentieth century**, having a huge impact on the fate of civilization.

The **revolution, to a large extent, predetermined the development of major trends in international politics, powerfully influencing the evolution of the world order**. The ideas, social, political and cultural practices born by it had a diverse impact, both on the developed states that formed the core of world capitalism, and on the countries of the world Periphery. Therefore, it is legitimate to call the Russian Revolution an event of world-historical significance.

By the **beginning of the 20th century, the Russian Empire occupied a dual position in the system of the world order**. On the one hand, being a state characterized by the maximum degree of absolutism, strong feudal remnants in the agricultural sector of the economy, social relations and the system of law, at the same time, for a long period, it demonstrated amazing stability as a stronghold of the "old order" of Europe. On the other hand, the growing gap with the new European mainstream, associated with the transition from the absolutist model to liberal democracies, the insufficient level of industrial and socio-economic development according to the criteria of the new, steadily developing system, demonstrated an increasing backwardness and, as a result, a lack of power of the Russian Empire. ... It itself gradually became an object of expansion of capital from the more developed countries of Europe and the United States, as a result of which Russia's financial and economic dependence on the core states of world capitalism increased.

A deep contradiction arose between the desire to continue territorial expansion, which was supported by imperial, military-feudal structures, and the lack of resources necessary for this. **Compared to the developed powers, Russia did not have sufficient financial capital, technologies, advanced social ideas necessary to ensure competitive advantages in world politics and economics.** The **defeat of Russia in the Russo-Japanese War of 1904-1905** and the **failure of the project of colonial development of the North-East of China** (known as "Yellow Russia") **clearly showed the limits of imperial policy.**

Faced by the beginning of the 20th century with growing geopolitical tensions in three regions of its strategic interests along the perimeter of the Empire's borders - in the Balkans, Central Asia, and the Far East, Russia was in dire need of allies. But the empire could offer them as its contribution only raw materials and human resources - millions of peasant subjects dressed in soldier's overcoats. This doomed Russia in advance to the subordinate role of a junior partner within any military-political coalition.

At the same time, there is reason to believe that not only and not so much geopolitical factors influenced Russia's final choice. The very logic of the system of international relations that took shape under the conditions of the development of global capitalism, where Russia occupied the place of the European Periphery, on the eve of the First World War, pushed the Romanov empire to choose in favor of Atlantic partners, which, in the end, cost it its existence. Customs wars with Germany over the grain trade, as well as the need for loans and concessions provided, first of all, by France and England, led Russia to an alliance with the Entente harder than dreams of Constantinople, the Turkish straits and other territorial claims.

However, the irony of history was that, even having joined the coalition of future winners, the Russian Empire lost its war. In this regard, it suffered the fate of those continental powers with which it fought. Austria-Hungary and the Ottoman Porte fell apart, leaving no trace on the world map. The German "Second Reich", having suffered painful and humiliating losses, was unable to realize its own hegemonic doctrine of "middle Europe". The collapse of the St. Petersburg empire of the Romanovs, which occurred against the backdrop of the First World War, easily fits into this series.

If we compare the internal structures, the Romanov monarchy was much closer to Constantinople than to Berlin or Vienna. Having secured the role of "cannon fodder" in the battles

of 1915 and 1916, Russia dropped out of the coalition due to the weakness and underdevelopment of its own state. A political system far from the principles of openness, equality and competitiveness, devoid of strong civil institutions, strongly associated with decrepit and absolutist monarchy, incapable of evolutionary change, failed at the most inopportune moment for this. This turned out to be not only a military failure, but the collapse of the entire structure that had been formed and functioned over the previous two centuries.

The **duality of the Russian Revolution consisted in the mismatch of the goals it proclaimed and the expectations it created**, with real development opportunities available in Russia at the beginning of the 20th century. This tragic discrepancy predetermined the subsequent character of the development of the country up to the present day.

For today's generations, the most important lesson of the century of Russian revolution is the need for rethinking, and, in fact, a new discovery of the ideas and values of the Enlightenment, for Russia and everything peace. Against the background of historical victories and failures, the Russian intellectual class is obliged to remember about unrealized historical task - the need to build a modern society based on the principles of law, civil self-government, social justice, universal values and politics of the world.

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1917 was not only a consequence of the military-political and international fiasco of the Romanov monarchy, but also an attempt to respond to foreign policy problems that it could not solve. One of the merits of the Revolution was that, perhaps for the first time in world

history, the state of peace between countries and peoples was recognized as a common good. This was articulated as a democratic demand at the national level and enshrined in the Constitution of the new state born of the Revolution. Peace as the main goal and value of politics is perhaps the most important lesson of 1917 in Russia.

The trap of Bolshevism that triumphed in October was, however, that peace, as the hope and plea of the Russian peasant masses, as well as the entire Bolshevik Project for the construction of communism, could not be realized in the light of the strategic goals that were proclaimed by the new government. The **longed-for "eternal peace", in Lenin's understanding, could be established only as a result of the destruction of capitalism as a world system**. In other words, on the ruins of that civilization, which by the beginning of the 20th century had already reached global proportions and which Russian radical Marxists hastened to challenge. A communist society also could not be built in a separate country that had fallen out of the system of world capitalism.

Achieving these goals inevitably presupposed a major war. It is no coincidence that immediately after the seizure of power, they began to actively disseminate a new political order for the entire territory of the former Russian Empire, seeing in this the prototype of the future world republic of Soviets. However, the **attempt to promote the Bolshevik Project to the countries of Europe failed already in 1919-1920**. Lenin's supporters faced the **inevitable choice of building socialism "in one single country"** that did not have the necessary economic, human, technological and cultural resources for this and experienced a development deficit. This **predetermined the consolidation of archaic authoritarian forms of power in the socio-political life, the dominance of the bureaucracy, the widespread use of violence as the main instrument for regulating social relations**. Under the new conditions, these forms assumed an **even harsher and more repressive character than in tsarist Russia.**

The **same choice led to a state of permanent bitter war that Russia, and later the Soviet Union, entered into with the rest of the world**, perceived as a "**hostile capitalist encirclement**." The war with the outside world, to which Russia, in fact, doomed itself, involved building not only a new state under the leadership of the sovereign party, but also all the special civilizational standards and institutions accompanying it. The **state of the dictatorship of the proletariat**, replacing the tsarist empire and taking its special place in the world, **finally turned the Russian peasant into a "man with a gun", a warrior and guardian of a global utopia**, endowed with a national mission to fight and crush the enemies of communism in the name of the future international world.

In the **international context, the Russian Revolution looks like one of the most successful and impressive attempts to respond to the challenge of global capitalism for the countries of the world Periphery**.

However, this answer, in the end, **did not lead to the crushing of the dominant world system, but to peripheral integration into it** on the terms of a special party that retains a fair amount of internal autonomy. As a consequence, this **involved severe internal restrictions on the penetration of financial capital, free trade**, and all those standards that were developed by the civilization of capitalism, **including the freedoms and political institutions of Western liberal democracy**.

The **unique combination of national and universalist intensity, however, prevented the Russian Revolution from going beyond the core territory of the former Russian Empire from the very beginning**. The possibility, or at least the illusion, of an alternative to global capitalism persisted for several decades after the failure of hopes for world revolution in the 1920s. Moreover, they even strengthened after the Second World War and the creation of the world socialist system, which, gradually expanding at the expense of the former colonial and semi-colonial countries, as it seemed then, could become a real alternative to world capitalism.

The **emergence of a bipolar world order led by the USSR and the USA, which had a clear ideological coloring, strengthened such hopes**. This was facilitated by the **search for a model of "socialism**

with a human face" that began in the 1950s and 1960s in the Eastern European socialist countries and in the USSR. However, **by the mid-1960s, the Soviet Union had already turned into a rigid and bureaucratic system that rejected any attempts at change** and had **long since lost the quality of a radical (Bolshevik) modernization project**. The **Soviet bureaucracy, like the earlier tsarist bureaucracy, preferred the primitive to change.**

Therefore, **attempts to reform the socialist project**, primarily in Czechoslovakia (1968) and Poland (1980), were **severely suppressed**.

At the same time, **one cannot fail to note the positive impact that the Soviet project had on the fate of the rest of the world throughout the 20th century**. He [It] **pushed developed countries to implement large-scale social reforms, thereby making a significant contribution to the formation of a model of a "welfare state"**, in which **unemployment is at a consistently low level, a high standard of living is provided for the majority of the population, and the protection of citizens' rights is guaranteed**. For a long time, the ability of the developed countries of the West to carry out social reforms in the interests of the majority of the population was for them a matter of survival in competition with the Soviet project.

Up **until the 1970s, the Soviet Project was the benchmark for Third World countries seeking industrial modernization**. During this period, the states liberated from the colonial oppression, which took a course towards the construction of socialism, often overtook the countries that chose the capitalist model of development in the pace of economic development.

However, **since the second half of the 1970s, it has become obvious that the development potential of the Soviet Project has been exhausted, *that it cannot withstand competition with Western capitalism***. In the last two decades of the 20th century, there was a rapid departure from the Soviet version of socialism. The ***perestroika*** **policy initiated by Mikhail Gorbachev was initially based on the ideas of a return to the ideals of the October Revolution. But already by 1990, Perestroika was aimed at a profound transformation of the Soviet Project and the transition to a universal path of development**. Based on this, it can be said that the **influence of the legacy of the Russian Revolution on the world was weakening more and more.**

Post-Soviet Russia plays a significant role in the modern global world, but this role will continue in the future if a new impetus arises for the country's own, internal development. Over the past hundred years since 1917, the **urgent tasks of Russian development have not lost their relevance: among them, democratization and modernization, overcoming the imperial legacy and, finally, the return of the universal and timeless legacy of the Russian Revolution**, which consists in the **recognition of peace, freedom and equality of countries and peoples as the highest value and goal of international politics.**

Revolution as an "assembly point" for the political course

During the Soviet era, it was customary to talk about two revolutions of 1917 - the February, which was bourgeois-democratic in its content, and the October, "proletarian", which opened the way for the construction of socialism. The center of official Soviet discourse was October 1917, around the events of which a myth was created about the birth of a new historical community - the Soviet people - from the flames of the Great October Socialist Revolution. In the national history of the twentieth century, she [It] had to act twice as an "assembly point", or legitimization of a new political course.

The first time this happened during the years of **the Khrushchev Thaw, when the new leadership of the USSR decided on the first cautious attempt at liberalization**, starting from criticism of Stalin, accused of distorting the ideals of October. Although **criticism of Stalin and, especially, Stalinism was limited, selective in nature and concerned mainly mass repressions, excessive centralization and bureaucratization of public life, the appeal to October 1917 became the starting point**. The image of "commissars in dusty helmets" was at that time almost the main criterion of artistic truth and moral authority.

The **second time the revolution of 1917 became a source of legitimacy [was] at the beginning of the policy of Perestroika, which aimed to create socialism "with a human face"**, which **would create ample opportunities**

for the creative self-realization of individuals. The Perestroika policy proceeded from the fact that the October Revolution had a humanistic potential, distorted and deformed in subsequent periods of the country's life. At first, the initiators of Perestroika saw the meaning of this policy in purifying the social and political foundations of the socialist system from distortions and deformations and thereby freeing the creative energy of the Soviet people. In the future, the ideology of Perestroika evolved in the direction of planetary, universal values, and the significance of the Revolution of 1917 in it noticeably decreased.

In post-Soviet Russia, the attitude towards the Revolution of 1917 changed markedly compared to the previous era and subsequently continued to evolve. In the **1990s, when the policy of the country was dominated by a course towards radical market and democratic reforms and rapprochement with the West,** the official discourse saw an even more rigid division of the Russian Revolution into the February and October revolutions than in the Soviet period. If the February Revolution during this decade was seen as the source of the birth of a new, democratic Russia, then the October Revolution was perceived sharply at the official level and in the public mainstream.

Negatively - as an event that pushed Russia onto a deadend the path of development, costing tens of millions of victims. During the sharp political struggle of the 1990s, which divided society into supporters of the continuation of radical reforms, and those who would like to preserve the old socialist system, the ideological legacy of October was actually monopolized by Soviet conservatives, the core of which was Stalin's supporters. This configuration to a large extent contributed to the **consolidation in the minds of a large part of the educated population of the negative perception of the October Revolution as an event that slowed down the development of Russia, throwing it off the main path of development of human civilization.**

At the beginning of the new century, in connection with internal political changes in Russia, the prevailing political course to preserve the status quo, the attitude towards the revolutionary events of 1917 at the official level began to change again. Thus, the assessment of February changed dramatically. From the source of the birth of democratic Russia, the February Revolution turned into a breaking point of the thousand-year-old Russian statehood. In relation to October, a more complex perception has formed. On the one hand, it is recognized that he continued the demolition of what was still left of the former Russia, and in this regard, October developed the line begun by February. It is no coincidence that it was in the 2000s that the notion of the revolutionary events of 1917 as a single Russian revolution, which destroyed the old Russia and laid the foundation for the construction of the Soviet state, was consolidated in the socio-political discourse. A positive assessment of this fact for the ruling post-Soviet elites would be tantamount to undermining their own legitimacy. At the same time, **it was during the Soviet era that Russia became one of the two superpowers with strong and centralized state.** Therefore, the attitude towards October 1917 of the ruling elites, who took a course towards the revival of the imperial greatness of the country, could not be unambiguously negative.

As for public assessments, the changes in the official discourse did not affect them in any way. A **positive attitude towards the February Revolution is still widespread mainly in liberal circles, towards the October Revolution** – mainly among those who share Stalinist views to one degree or another, but **also among the intelligentsia who adhere to leftist, social democratic or Marxist views.**

To a large extent, the negative attitude of a large part of the modern Russian intelligentsia towards the ideological heritage of October is due to the crisis of the traditional leftist idea in the world. Meanwhile, the model of social-liberal capitalism, which until recently was perceived as the crowning achievement of social development, is also in deep crisis today, it lacks a real alternative. Left-wing concepts that were popular

in the 20th century have lost their effectiveness and attractiveness, and new socio-political projects are in the process of formation.

INSTEAD OF A RESUME

The **Bolshevik project for the reorganization of the country was initially of a global nature**, but from the point of view of historical results, it **turned out to be limited and incomplete**. He [It] **never went beyond the general rut of attempts to renew Russia on the principles of "enlightened authoritarianism" with subsequent "counter-reforms"** that took place both before and after 1917.

Thus, the **challenge of the Russian Revolution was not just a reaction, but the threat of archaization**, which is practically inevitable in the wake of a destructive uprising of the unenlightened masses. A historic victory in these conditions was the very preservation of the country, followed by breakthrough development, which ensured the transition to an industrial urbanized type of society.

The **historical defeat of the Russian Revolution of 1917 was due to the extreme weakness of the democratic alternative for Russia**. The **subsequent degeneration of Bolshevism into Stalinism was a disaster for the ideology and practice of democratic socialism**, the ideas of which sounded loud enough during the revolution but were trampled down and lost as a result of the strongest split in society and the consequences of the Civil War.

At the same time, the **ideas of freedom and equality generated by the 1917 revolution contributed to the emergence of various social and artistic utopias, the consolidation of humanistic principles in the best works of Soviet literature and art**. They made a significant contribution to the cultural development of human civilization throughout the twentieth century. Their significance continues to this day.

The **ideas put forward by the Russian Revolution had a noticeable impact on the transformation of global capitalism in the 20th century, but "world socialism" did not become a real alternative to it and the system it created**. By the beginning of this century, the **transformative potential of the Russian Revolution had been exhausted**. Perhaps the new left, which, apparently, will again be in demand in developed countries in the coming years, will once again turn to the experience and ideas of the Russian Revolution of 1917. At the same time, in socio-political projects for the reorganization of society on the basis of leftist ideas, the emphasis is on the development of self-government and self-organization of the population, decentralization of management and its shift to the lower "floors" of the political system. That is, for everything that was never developed in the Soviet project, the source of which was the Revolution of 1917.

The **duality of the Russian Revolution consisted in the discrepancy between the goals that it proclaimed and the expectations that it gave rise to**, with the real development opportunities that existed in Russia at the beginning of the 20th century. **This tragic discrepancy predetermined the subsequent character of the country's development up to the present day.**

For today's generations, **the most important lesson of the century of the Russian Revolution is the need to rethink, and, in fact, a new discovery of the ideas and values of the Enlightenment, for Russia and the whole world.** Against the backdrop of historical victories and failures, the Russian intellectual class must remember the **unrealized historical task – the *need to build a modern society based on the principles of law, civil self-government, social justice, universal human values and the politics of peace*.**

[Courtesy: https://www.gorby.ru/; We have reproduced this Google Translate (and edited) version of the (Russian original) report in the context of the **115th Anniversary of the October Revolution** - Ed.]

* * * * *

GROWING DESPERATION IN THE EMPIRE OF LIES

- Stephen Lendman[♣]

The **empire of lies and forever wars is being licked and embarrassed by Russia's liberating SMO** against **Nazi-infested Ukraine**. Its **unparalleled sanctions war on Russia backfired against *a largely self-sufficient country***.

Its anti-Russia actions caused **growing public anger in European countries over soaring inflation, supply chain disruptions, and economic decline** – what may be severe and protracted. While **holding up better than other Western states, US economic conditions are weak.** Hard times getting harder are taking its toll on most households, the housing market and growing numbers of enterprises, especially small to medium-sized ones. // **Unparalleled US sanctions war on Russia, notably on its energy sector** when the Wall Street owned and controlled Fed is raising interest rates, **is responsible for US economic decline** at a time of reduced consumer spending because incomes aren't keep pace with the high cost of living. **Economic growth depends on readily available, affordable energy**. **RUSSIA** is a **major oil producer, the world's leading source of natural gas**. It's the ***world's most resource-rich nation***. Besides oil and gas, they include coal, iron ore, timber, gold, silver, diamonds, titanium, copper, rare earths, aluminum, uranium, copper, palladium, platinum, nickel, and many others – worth an estimated $75 trillion. European and many other nations rely on access to Russian commodities. **Blocking their imports is self-destructive, especially its energy**. If constrained by energy **shortages or high cost, GDP growth is curbed. European nations are self-inflicting harm** on their economies and people **by greatly curtailing or halting imports of Russian oil and gas.** The empire of lies and forever wars seeks Venezuelan oil to help alleviate the shortfall caused by its sanctions war on Russia. // Since Bolivarian social democracy replaced fascist tyranny in Feb. 1999 with the election of Hugo Chavez as Venezuelan president, hegemon USA sought regime change. **With over 300 billion barrels of reserves, Venezuela is the world's most oil-rich nation**. Yet **US sanctions war on the country is all about wanting its Bolivarian democracy undermined** – about wanting the threat of its good example eliminated, about its freedom from hegemonic control, **wanting the nation transformed back into a US vassal state** under subservient puppet rule. // **Sanctions by one country on another have no legal validity.** Under **Chapter VII of the UN Charter, the Security Council alone may authorize intervention against member states to restore peace, stability and security**. Hegemon USA operates exclusively by its own rules – time and again in flagrant breach of international law.

Its sanctions war on targeted nations are unjustifiably justified by bald-faced Big Lies. Against Venezuela, they're based on nonexistent terrorism, drugs trafficking, anti-democratic actions, human rights violations, corruption, and human trafficking. **All of the above – and forever wars on invented enemies – are US specialties**, the **Bolivarian Republic involved in none of them** by its ruling authorities. From Bush/Cheney to Obama/Biden to Trump to the current illegitimate US regime under a White House imposter, **US dirty hands have gone all-out to undermine Venezuela's economy by sanctions war and other dirty tricks**. In 2019, the Trump regime escalated sanctions war on Venezuela ..... At this time **under a so-called agreement between Caracas and the Biden regime** – what's vulnerable to be breached at the latter's discretion – **around $3 billion of illegally blocked Venezuelan funds will be dispersed by the imperial tool UN to address social needs of the nation's people**. The agreement also includes **approval by the Biden regime's Treasury Department for Chevron** "to resume limited natural resource extraction operations in Venezuela." // **The agreement excludes the ability of state oil company PDVSA to operate free from illegal US sanctions**. Other illegally imposed US sanctions remain in place. ..... For over two decades, hegemon USA – under both wings of the one-party state – has been waging undeclared war by other means on Venezuela's Bolivarian social democracy. // **Much the same goes on by the empire of lies against all nations free from its control** – by hot and/or other means. It goes on against ordinary Americans and their counterparts worldwide. **Hegemon USA can never be trusted.**

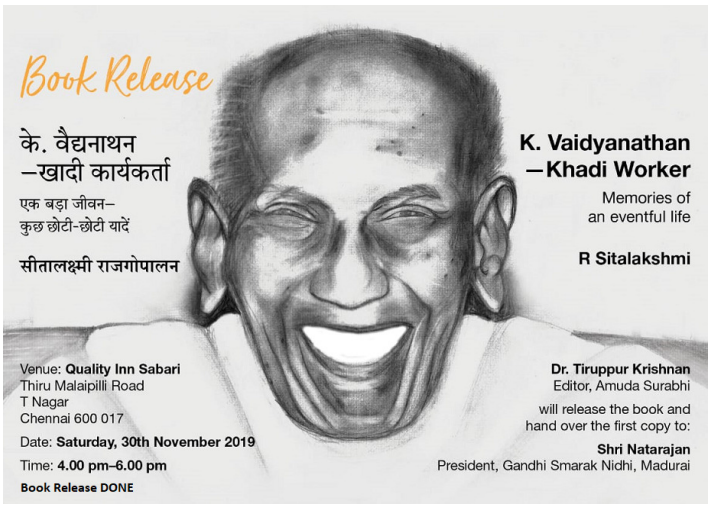
Throughout its history from inception, its ruling regimes breached virtually everything agreed to in pursuit of their diabolical aims. The **Biden regime's agreement with Venezuela hangs by a thread** – ***to be breached whenever the former's dark forces***, or their successors, **go another way. As long as nations remain *free from US control, they're considered enemies of the state* – targeted for regime change by whatever it takes for the empire of lies to achieve its diabolical aims**. ***The nation I grew up in long ago is an unparalleled threat to peace, the rule of law and everyone everywhere yearning to breathe free*** from its scourge.

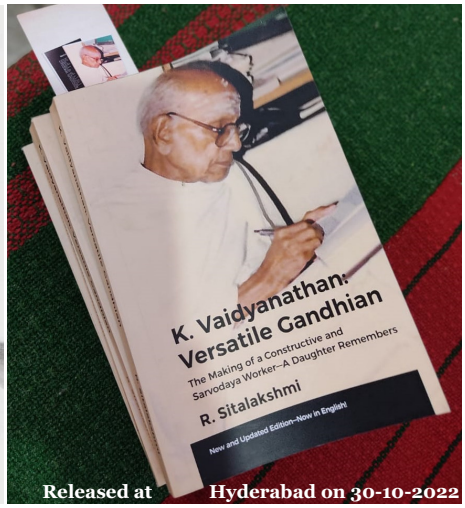
* * * * *

♣ Courtesy: **Stephen Lendman** at https://stephenlendman.org/; dt. 29-08-2022; edited; emphases in bold ours - IMS.

With Best Wishes:

IN MEMORY OF
LATE SRI VAIDYANATHAN
{Centenarian Gandhian Freedom Fighter}





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MY HEART'S FIT TO BREAK

My heart's fit to break, yet no tear fills my eye,
As I gaze on the moon, and the clouds that flit by;
The moon shines so fair, it reminds me of thee,
But the clouds that obscure it are emblems of me.

They will pass like the dreams of our pleasures and youth,
They will pass like the promise of honor and truth,
And bright thou shalt shine when these shadows are gone,
All radiant, serene, unobscur'd--but alone.

* * *

WEEP FOR WHAT THOU'ST LOST

Images above:
1. Portrait of Lady Caroline Lamb by Thomas Lawrence
2. Lady Caroline's mother, Henrietta, Countess of Bessborough, by Angelica Kauffman in 1793.
3. Lady Caroline Lamb nee Ponsonby
4. Lady Caroline Lamb by Eliza H. Trotter, 1810s

* * *

Weep for what thou'st lost, love--
Weep for what thou'st done--
Weep for what thou did'st not do,
And more for what thou'st done.
Time that's gone returneth never,
Keen repining lasteth ever;
Heart that's pierc'd refuseth gladness,
Melancholy causeth madness.

Yet if tears avail not,
Tears of fond regret;
Arm thy mind, and proudly girl,
Endeavour to forget.
Shouldst thou spend thy days in grieving,
What is past, there's no retrieving,
Once the hour of passion over,
Tear nor frown recalls a lover.

* * *

AS THE FLOWER EARLY GATHERED

As the flower early gathered, whilst fresh in its bloom,
So was she whom I mourn for sent young to the tomb;
In the pains of her travail, the prime of her youth,
Whilst the memory survives of her sweetness and truth.

Why bursts from this breaking heart one human sigh,
She but sleeps--whilst her spirit is borne up on high;
Her course upon earth was so fair and so even,
That I know her pure soul has ascended to Heav'n.

Ah! cease then poor orphans to mourn round her bier,
'Tis for you--'tis for you that I shed the sad tear;
I will toil for you, dear ones, though she is no more,
And we must not lament that her sufferings are o'er.

* * * * *

SING NOT FOR OTHERS BUT FOR ME

- Lady Caroline Lamb*

Sing not for others but for me,
In ev'ry thought, in ev'ry strain,
Though I perchance am far from thee,
And we may never meet again:
Though I may only weep for thee,
Sing not for others but for me.

In starry night, or soft moon-beam,
In mossy bank, or rippling stream,
In balmy breeze or fragrant flower,
Though dearer hands may deck the bower,
In all that's sweet or fair to thee,
Sing not for others but for me.

If e'er thou sing'st thy native lay,
As thou wert wont in happier day,
That lay which breath'd of love and truth,
And all the joys of early youth:
Though all those joys are past for thee,
Sing not for others, but for me.

* * *

AFTER MANY A WELL-FOUGHT DAY

After many a well-fought day,
When with gen'rous ardour burning,
Soldiers to their home returning,
Chide the long and tardy way.
Home advancing near and nearer,
Wives and friends to greet them run;
Dear before, but now far dearer,
From the gallant deeds they've done.

Some distracted wild with pleasure,
Hands and hats and ribbons wave;
Others sad, the long line measure,
For the friends no prayer could save.
Is he gone? they ask with sorrow,
Is he lost? they ask with dread:
Will he not return to-morrow?
Is our gallant soldier dead?

Yes! he's dead--but fell with glory,
Fell, his country's rights to save:
Yes! he's dead--but lives in story,
Honour decks the soldier's grave.
Then with hearts too nearly broken,
To their lonely homes they turn,
Pressing to their lips some token,
From the friend for whom they mourn.

* * * * *

LADY CAROLINE LAMB

(born: 13-11-1785; died: 25-01-1828 at Hatfield, U.K.)

(née *Ponsonby*; 13 November 1785 – 25 January 1828) was an Anglo-Irish aristocrat and novelist, best known for *Glenarvon*, a Gothic novel. She was also a good poet. Her husband was Hon. William Lamb, who after her death became British prime minister.

In 1812 she had an affair with Lord Byron, whom she described as "mad, bad, and dangerous to know". And there are not a few who direct that phrase to she herself!

* * *

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